Supreme Court, U. S.
FILED
JUL 16 1980
MICHAEL RODAK, JR., CLERK

80-118

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

KERRY P. DAY; RHETT G. CAMPBELL;
RICHARD D. HUFF; PETER H. LUKE;
PAUL M. SCOTT; JAMES A. TERHUNE;
and all others similarly situated,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Kenneth M. Morris
1617 Marathon Building
600 Jefferson Avenue
Houston, Texas 77002
(713) 659-8697

July 16, 1980

QUESTIONS PRESENTED FOR REVIEW

1. Whether any Petitioner has been wrongfully denied his basic allowance for quarters to which he is statutorily entitled under 37 U.S.C. § 403(a).

2. Whether any Petitioner was assigned to government housing that was "appropriate to his grade, rank, or rating and adequate" within the meaning of 37 U.S.C. § 403(b).

   a. Whether Respondent can nullify any Petitioner's statutory entitlement to a basic allowance for quarters by assigning him to "any quarters."

   b. Whether the President ever authorized the payment of a basic allowance for quarters to any Petitioner who was not assigned to government quarters that were "appropriate to his grade, rank, or rating and adequate" within the meaning of 37 U.S.C. § 403(b).

   c. Whether the President ever authorized the Secretary of Defense and/or the Secretary of the Air Force to establish standards or criteria that would govern "appropriate to his

grade, rank, or rating and adequate" within the meaning of 37 U.S.C. § 403(b).

d. Whether the Secretary of Defense and/or the Secretary of the Air Force ever established standards or criteria that govern "appropriate to his grade, rank, or rating and adequate" within the meaning of 37 U.S.C. § 403(b).

3. Whether Respondent can legally refuse to pay a Petitioner his statutory entitlement to a basic allowance for quarters when the Air Force real property records for the quarters to which a Petitioner was assigned officially classified the quarters as "inadequate" to "accommodate the function" of housing officers.

4. Whether Respondent can legally refuse to pay a Petitioner his statutory entitlement to a basic allowance for quarters when the quarters to which a Petitioner was assigned did not meet the "minimum adequacy standards" set forth in Department of Defense Instructions and/or Air Force regulations.

5. Whether Respondent can nullify a Petitioner's statutory right to a basic allowance for quarters by engrafting geographical exclusions or military exceptions upon the statute.

6. Whether the summary judgment evidence in the record demonstrates as a matter of law that 110 square feet was the sole governing standard for "appropriate to his grade, rank, or rating and adequate" within the meaning of 37 U.S.C. § 403(b) applicable to each Petitioner while he was stationed in Thailand.

LIST OF ALL PARTIES

Petitioners

This case has been certified as a class action in accordance with Rule 23(b)(3), FED. R. CIV. P., and notice has been given by mail to each class member.

Kerry P. Day, Rhett G. Campbell, Richard D. Huff, Peter H. Luke, Paul M. Scott, James A. Terhune, and

> all unmarried officers without dependents serving in the Department of the Air Force who were permanently stationed in Thailand

during some portion of the period from January 26, 1970 through January 26, 1976 and who were assigned to quarters of the United States or housing facilities under the jurisdiction of the Department of the Air Force

who have not opted out of the class are the Petitioners.

Respondent

The United States of America is the Respondent.

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(September 16, 1975) . . . . . xxxii, passim

388 Combat Support Group, Base Regulation 30-7 (January 10, 1975) xxix

REFERENCE TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not yet been officially reported. A copy of the Fifth Circuit's opinion appears in the Appendix hereto.

The opinion of the District Court for the Northern District of Texas is officially reported as Day v. United

States, 441 F.Supp. 165 (N.D.Tex. 1977). A copy of the District Court's opinion also appears in the Appendix.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 15, 1980. A timely petition for rehearing was denied on April 17, 1980, and this petition for certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under Section 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Constitutional Provisions

1. U.S. CONST. art. I § 1.

> All legislative Powers herein granted shall be vested in a Congress, which shall consist of a Senate and House of Representatives.

Statutes

1. 37 U.S.C. § 403 (1970), as amended, (Supp. 1980):

> (a) Except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the monthly rates

prescribed in accordance with section 1009 of this title, according to the pay grade in which he is assigned or distributed for basic pay purposes.

(b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniform service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. . . .

(c) A member of a uniformed service without dependents is not entitled to a basic allowance for quarters while he is on field duty, unless his commanding officer certifies that the member was necessarily required to procure quarters at his expense, or while he is on sea duty. For purposes of this subsection, duty for a period of less than three months is not considered to be field duty or sea duty.

* * *

(j) The President may prescribe regulations for the administration of this section, including definitions of the words "field duty" and "sea duty."

Regulations

1. Executive Order 11157, 29 Fed. Reg. 7973 (1964), reprinted in 37 U.S.C. § 301 (note) (Supp. 1980). [A-18].

* * *

Sec. 403. Any quarters or housing facilities under this jurisdiction of any of the uniformed services in fact occupied without

payment of rental charges . . . at his permanent station by a member without dependents . . . shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member. . . .

* * *

Sec. 407. The Secretaries concerned (within the meaning of section 101(5) of title 37 of the United States Code) [includes the Secretary of the Air Force], with respect to personnel of the uniformed services within their respective departments, are hereby authorized to prescribe such supplementary regulations not inconsistent herewith as they may deem necessary or desirable for carrying out these regulations, and such supplementary regulations shall be uniform for all the services to the fullest extent practicable.

2. Department of Defense Instruction No. 4165.47 (April 6, 1967). [A-26].

* * *

III. POLICY AND PROCEDURES

A. It is the policy of the Department of Defense that the housing accommodations assigned to personnel without dependents meet not only basic physiological needs, but also provide the space, privacy and housekeeping equipment and furnishings commensurate with the standard of housing available in the civilian economy with authorized basic allowance for quarters.

B. The Secretaries of the Military Departments and Directors of

Defense Agencies shall issue procedures containing the provisions of III. A., above, and the following:

1. For all permanently assigned commissioned officers, pay grades 01 and 02, and warrant officers, entitled to BAQ at the without-dependent rate, and all officers in a travel status, the authorized minimum standard in a permanent or semi-permanent facility will be unshared accommodations consisting of a combination sleeping/living room, and a bath. All residential-type quarters (Tri-Service Definitive and similar designs), including those with shared baths; and all apartment type quarters (two bedrooms, shared baths and living rooms) will be considered acceptable for this assignment at the occupancies for which designed.

2. For permanently assigned commissioned officers in grades 03 and above, the authorized minimum standard in a permanent or semi-permanent facility will be accommodations consisting of an unshared bedroom, living room and bath, and access to a kitchen/kitchenette (where a closed mess is provided in connection with a BAQ facility, kitchen access will not

be required). All residential-type quarters (Tri-Service Definitive and similar designs), including those with shared baths; and all apartment type quarters (two bedrooms, with shared baths and living rooms, with or without shared or unshared kitchens) will be considered acceptable for this assignment at the occupancies for which designed.

* * *

7. Military necessity may temporarily require the involuntary assignment of personnel to quarters below the standard of this Instruction. Personnel occupying quarters below these standards either voluntarily or involuntarily becase of the military necessity, will not be authorized payment of their basic allowance for quarters or full per diem.

* * *

Department of Defense Instruction No. 4165.47 (May 12, 1972). [A-31].

* * *

IV. POLICY

A. It is the policy of the Department of Defense that the housing accommodations assigned to bachelor personnel meet not only basic physiological needs, but also

provide the space, privacy and furnishings required for comfortable living.

B. The minimum standards of adequacy apply to all bachelor housing except for shipboard duty or field duty. Otherwise the minimum standards of adequacy of bachelor housing apply worldwide except when specific exceptions are made by the Head of the DoD Component concerned.

* * *

V. MINIMUM STANDARDS OF ADEQUACY

* * *

C. Temporary Construction. All temporary construction is considered to be inadequate unless specifically excepted by the Head of the DoD Component or his designee.

* * *

E. Application

1. Minimum standards of adequacy of existing inventory for permanent party personnel are contained in enclosure 1. [Grade 0-3 and above: Gross living area of 400 square feet with a living room, bedroom, private bath, access to kitchen or closed mess with the type of construction being perma-

nent or semi-permanent. Grade 01 and 02: Gross living area of 250 square feet with a sleeping/living room and private bath with the type of construction being permanent or semi-permanent.]

* * *

VI. OCCUPANCY

A. Military Necessity. Regardless of standards of adequacy or occupancy, military necessity is an overriding consideration in determining occupancy requirements. The following definition of "military necessity" is applicable:

> "Military necessity is defined as those military conditions or considerations which, in the judgment of the commanding officer, the activity commander, or the DoD Component concerned, as delegated by the Head of the DoD Component, require an individual to be billeted in a government owned or controlled facility in order that the mission assigned may be effectively accomplished."

* * *

VIII. BASIC ALLOWANCE FOR QUARTERS (BAQ)

A. Members without dependents who occupy adequate or inadequate bachelor quarters, either voluntarily or involuntarily, will not be authorized payment of their BAQ. . . .

4. Department of Defense Instruction No. 4165.47 (October 23, 1974). [A-41].

* * *

III. POLICY

A. The housing accommodations assigned to bachelor personnel shall meet basic physiological needs, and provide the space, privacy, and furnishings required for comfortable living.

B. The minimum standards for adequacy of bachelor housing, except for shipboard duty or field duty, shall apply world-wide unless specific exceptions are made by the Head of the DoD Component concerned.

* * *

IV. MINIMUM STANDARDS OF ADEQUACY

* * *

C. Temporary Construction. All temporary construction is considered inadequate unless specifically excepted by the Head of the DoD Component or his designee.

* * *

E. Application

1. Minimum standards of adequacy of existing inventory for permanent party personnel are contained in enclosure 1. [Grade 0-3 and above: Net living area of 400 square feet with a living room, bedroom, private bath, and access to kitchen or closed mess with the type of construction being permanent or semi-permanent. Grade 0-1 and 0-2: Net living area of 250 square feet with a sleeping/living room and private bath with the type of construction being permanent or semi-permanent.

* * *

V. OCCUPANCY

A. Military Necessity. Regardless of standards of adequacy or occupancy, military necessity shall be the overriding consideration in determining occupancy requirements when, in the judgment of the responsible commander, the billeting of an individual in a Government-owned or -controlled facility is required to bring about the successful conclusion of a military operation.

* * *

VII. BASIC ALLOWANCE FOR QUARTERS (BAQ)

A. Members without dependents who occupy adequate or inadequate bachelor quarters at their permanent station, either voluntarily or involuntarily, will not be authorized payment of BAQ.

* * *

5. Air Force Manual 87-18 (December 21, 1972). [A-51].

1-6. Explanation of Terms. For purposes of this manual the following terms apply:

* * *

d. Condition. The capability of the facility to accommodate the currently approved function.

e. Construction. The erection, installation, or assembly of a new facility; the addition, expansion, extension, alteration, conversion, or replacement of an existing facility; or the relocation of a facility from one installation to another. Includes equipment installed and made a part of the facility and the related site preparation, excavation, filling, and landscaping or other improvements made to the land.

(1) Permanent Construction. A facility suitable and appropriate to serve a specific purpose for a maximum period of time (at least 25 years) and with a minimum of maintenance.

(2) Semipermanent Construction. A facility suitable and appropriate to serve a specific purpose for limited period of time (less than 25 years but more than 5 years) and with a moderate to high degree of maintenance.

(3) Temporary Construction. A facility suitable and appropriate to fill a need for a short period of time (5 years or less) without regard to degree of maintenance and the designs and details of which provided minimum facilities with maximum initial economies.

f. Facility. A separate individual building, structure, or other real property improvement.

* * *

6. Air Force Manual 93-1 (January 15, 1964). [A-52].

* * *

Chapter 3

REAL PROPERTY ACCOUNTABLE RECORDS—ESTABLISHMENT, PREPARATION, AND MAINTENANCE

Section A—Real Property Accountable Records

* * *

3-2. Accounting Record Forms. AF Forms 1430 through 1443 and AF Form 1450, "Real Property Accountable Record—Supplemental Card", constitute the formal real property accountable records. . . .

Section B—Preparation of Real Property Records

3-3. General. The following general information will be entered on each real property record card maintained as part of the real property accountable record:

* * *

i. Category Code. Enter the basic item code as listed in Section E, AFM 85-27, which is most descriptive of the facility as presently designated. Present designation is to be based on original design if the facility has not been permanently converted. If the facility has been permanently converted, present designation will be the use for which it was permanently converted.

* * *

l. Condition. In line and block space, enter the appropriate term and corresponding code which describes the condition of the facility. (See AFM 87-18.)

* * *

o. Type of Construction. Show the type of construction of the building or facility, by appropriate description and code. (See AFM 87-18.)

7. Air Force Manual 300-4 (June 15, 1973). [A-54].

* * *

3. Definition/Explanation: Identifies the current state of a facility as to its physical condition and structural adequacy.

* * *

5.

Abbrv. Data Codes	Data Items and Explanations
1	Usable—Class A (Adequate)—Generally meets criteria. A facility which can be used to house the function for which currently designated through end position use with reasonable maintenance and without major alteration or reconstruction. Its functional adequacy, physical condition, structural adequacy, location, and adequate utility systems i.e., heating, air conditioning, ventilation, power, etc., are the major elements of the determination. The use of this code does not prohibit project work. However, any construction project will indicate either a change in use, conversion or addition.
2	Usable—Class B (Substandard)—Upgrading required and practical. A facility which is structurally sound, and

which is inherently capable of being raised to Usable—Class A standards for housing function for which currently designated by reasonable and practical expenditure of funds; i.e., alteration, soundproofing, relocation, strengthening, fire protection deficiency correction, air conditioning, heating, or mechanical ventilation.

3 Force Use (Substandard). A facility that cannot practically be raised to meet Usable--Class A standards for housing function for which currently designated, but which, because of necessity must be continued in use for a short duration, or until a suitable facility can be obtained. Its physical condition, location, lack of adequate utility systems or other overriding factors are such that the facility cannot be justifiably or economically improved and/or upgraded for that function. This definition is also applicable to a leased facility where the lease was

entered into as the only means by which the required space could be provided. This excludes leases which are advantageous to the Air Force for reasons of short duration of requirement, location, economics, etc., which will be Code 1.

4 Sterile—A facility which: (a) does not meet the condition classification Codes 1, 2, 3, or 5; (b) is excess to mission requirement in designed, changed, or converted use and is not, due to economic considerations, considered appropriate for disposal. The expenditure of maintenance funds on facilities in this classification is not authorized except for safety, health, and/or 'pickling' the facility. This code will apply to all facilities as they are vacated when the entire installation becomes excess of requirements.

5 Unusable—A facility which is no longer tenable for any purpose. It assumes that unsatisfactory or un-

safe conditions exist which render it unacceptable and useless for housing personnel, equipment or supplies. This designation cannot be applied until the facility is vacated and when applied, requires disposal action within 120 days. Classification of airfield pavements as unusable must be approved by Hq USAF.

NOTES:

1. The Real Property Condition Codes 1, 2, and 3 are applied based upon the capability of the real property facility to accommodate the function for which currently designated on the 1-HAF-Z17. Therefore, that code is no indication of the ability of the facility to accommodate a different function.

2. Although structural condition must be considered in ascertaining code to be assigned, it is not the sole factor. Location of the facility with reference to other facilities or to adverse environmental conditions (air, noises), functional layout, and condition of support utilities are equally important.

3. Facilities which would be Code 1 will not be assigned a Code 2 or 3 based only on inadequate size.

4. The Data Element, 'Forced Use,' was formerly the Element, 'In Use.'

8. Air Force Manual 30-7 (January 1, 1970). [A-57].

BACHELOR AND TRANSIENT QUARTERS,
AND GUEST HOUSES

Chapter 1
General Information

1-1. Terms Explained:

a. Adequate Quarters. Officer quarters and airman dormitories in which living accommodations assigned an individual meet the common and minimum standards of adequacy for occupancy established in this manual.

* * *

b. Basic Allowance for Quarters (BAQ). An amount of money, prescribed and limited by law, which an officer or airman receives to pay for quarters not provided by the Government.

* * *

p. Inadequate Quarters. Officer quarters and airman dormitories in which living accommodations assigned an individual do not meet the common and minimum standards of adequacy for occupancy established in this manual.

* * *

r. Military Necessity. Military conditions or considerations which, in the opinion of the installation commander, require an individual to live in Government-owned or controlled quarters. In the case of quarters to be occupied on a rental basis, military necessity means that, in the opinion of the installation commander,

necessary service cannot be rendered, or that property of the Government cannot adequately be protected, unless the individual occupies the quarters.

s. Minimum Adequacy Standards. Authorized standards which are mandatory in application, unless exceptions are otherwise covered in this manual.

Chapter 2
Adequacy Standards

* * *

2-2. Minimum Adequacy Standards. The minimum adequacy standards apply to Government-owned, controlled, or leased bachelor and transient quarters at all Air Force installations. Oversea major commands may make appropriate reductions in these standards for areas involved in combat or contingency operations, or areas directly supporting these operations:

* * *

a. Officers and Authorized Comparable-Grade Civilian Employees.

* * *

(1) Bachelor Permanent Party and PCS Student Officers (Grades 0-3 and Above) and Authorized Comparable-Grade Civilian Employees. An apartment consisting of unshared living room, bedroom, and bath, with access to a kitchen/kitchenette (where an officer's field ration dining hall is

provided in connection with an OQ, kitchen/kitchenette access will not be required).

* * *

(2) Bachelor Permanent Party and PCS Student Officers (Grades 0-1 and 0-2) Warrant Officers, and Authorized Comparable-Grade Civilian Employees. An unshared combination sleeping/living room and bath.

Chapter 3

ASSIGNMENT AND TERMINATION OF OFFICER QUARTERS AND AIRMEN DORMITORIES

* * *

3-4. Assignment of Bachelor Quarters:

* * *

g. Military necessity may require the involuntary assignment of personnel to bachelor quarters below the standards prescribed by this manual. Bachelor military personnel and civilian employees occupying such quarters involuntarily because of military necessity, will not be authorized payment of BAQ/LQA.

9. PACAF Supplement AFM 30-7 (June 22, 1970). [A-88].

AFM 30-7, 1 January 1970, is supplemented as follows:

* * *

2-2. The minimum adequate standards listed in this basic manual apply only to Hawaii in the PACAF area. . . . SEA designation standard gross floor area will be adhered to in Thailand, Vietnam, and Ching Chuan Kang AB (that is, 70 sq. ft. for enlisted personnel and 110 sq. ft. for officer personnel excluding space for bathing and toilet facilities.)

10. PACAF Supplement AFM 30-7 (April 5, 1971). [A-94].

AFM 30-7, 1 January 1970, is supplemented as follows:

* * *

2-2. The minimum adequate standards listed in the basic manual apply only to Hawaii in the PACAF area. . . . SEA designation standard gross floor area will be adhered to in Thailand (except Don Muang) and Vietnam (that is, 70 sq. ft. for enlisted personnel and 110 sq. ft. for officer personnel excluding space for bathing and toilet facilities.)

11. PACAF Supplement AFM 30-7 (July 28, 1971). [A-101].

PACAF Supplement 1, 5 April 1971, to AFM 30-7, is changed as follows:

* * *

2-2. SEA designation standard gross floor area will be adhered to in Thailand (except Don Muang) and Vietnam; that is, 70 sq. ft. for enlisted personnel and 110 sq. ft. for officer personnel excluding space for bathing and toilet facilities.

12. Air Force Manual 30-7, CHANGE 1 (April 26, 1974). [A-105].

AFM 30-7, 1 January 1970, is changed as follows, and implements DOD Instruction 4165.57, 30 July 1973.

Chapter 2

ADEQUACY STANDARDS

* * *

* 2-2. Minimum Adequacy Standards. The minimum standards of adequacy apply to government-owned, controlled, or leased bachelor housing. They apply equally to military and civilian personnel of equivalent rank except where contracts with civilian personnel specifically define a standard of adequate housing to be provided. These standards will not be reduced without approval of this HQ USAF/DPXOH. Exception: Oversea major commands may make appropriate reductions in these standards for areas involved in combat or contingency operations or areas directly supporting these operations.

* a. Standards. Minimum standards of adequacy of existing inventory for Permanent Party/PCS student personnel are in table 2-1. [Grade 0-3 above: Gross living area of 400 square feet consisting of a private bedroom, private bathroom, living room (shared by not more than one other), and kitchen (shared by not more than one other) with the type of construction being permanent or semi-permanent. Grade 0-1 and 0-2: Gross living area of 250 square feet consisting of an unshared sleeping/living room combination, and private bath with the type of construction being permanent or semi-permanent.]

*(1) Temporary Construction. All temporary construction is considered to be inadequate. AFM 87-18, paragraph 1-6e, is the guiding directive for determining temporary construction. Personnel will not be

required to involuntarily occupy these quarters (except in oversea combat/contingency areas) without approval of HQ USAF/DPXOH.

13. 388 Combat Support Group, Base Regulation 30-7, para. 6a, page 2 (January 10, 1975).

The Base Commander has determined that military necessity requires the involuntary assignment of personnel to bachelor quarters . . . below standards prescribed in paragraph 2-1, AFM 30-7 (reference paragraph 3-4g, AFM 30-7).

14. Air Force Regulation 30-7 (May 12, 1975). [A-111].

BACHELOR HOUSING AND
TRANSIENT QUARTERS

Supersedes AFM 30-7, January 1970.

Chapter 1
GENERAL INFORMATION

1-1. Terms Explained:

a. Adequate Bachelor Housing/Quarters. Bachelor housing that meets the standards of adequacy for occupancy established in this directive.

* * *

g. Basic Allowance for Quarters (BAQ). An amount of money, prescribed and limited by law, which an officer or airman receives to pay for quarters not provided by the Government.

* * *

p. Inadequate Quarters. Officer quarters and airman dormitories in which living accommodations assigned an individual do not meet the common and minimum standards of adequacy for occupancy established in this directive.

* * *

r. Military Necessity. Military conditions or considerations which, in the opinion of the installation commander, require an individual to live in Government-owned or controlled quarters. In the case of quarters to be occupied on a rental basis, military necessity means that, in the opinion of the installation commander, necessary service cannot be rendered, or that property of the Government cannot adequately be protected, unless the individual occupies the quarters.

s. Minimum Adequacy Standards. Authorized standards which are mandatory in application, unless exceptions are otherwise authorized in this directive.

* * *

Chapter 2
ADEQUACY STANDARDS

* * *

2-2. Minimum Adequacy Standards. The minimum standards of adequacy apply to government-owned, controlled, or leased bachelor housing. They apply equally to military and civilian personnel of equivalent rank except where contracts with civilian personnel specifically define a standard of adequate housing to be provided. These standards will not be reduced without approval of HQ USAF/DPXVH. Exception: Oversea major commands may make appropriate

reductions in these standards for areas involved in combat or contingency operations or areas directly supporting these operations.

a. Standards. Minimum standards of adequacy of existing inventory for Permanent Party/PCS student personnel are in table 2-1. [Grade 0-3 and above: Net living area of 400 square feet consisting of a private bedroom, private bathroom, living room (shared by not more than one other) and kitchen (shared by not more than one other) with the type of construction being permanent or semi-permanent. Grade 0-1 and 0-2: Net living area of 250 square feet consisting of an unshared sleeping/living room combination and private bath with the type of construction being permanent or semi-permanent]. When these quarters are available, Basic Allowance for Quarters (BAQ) will not be authorized. . . .

(1) Temporary Construction. All temporary construction is considered to be inadequate. AFM 87-18, paragraph 1-6e, is the prescribing directive for determining temporary construction. Personnel will not be required to involuntarily occupy these quarters (except in oversea combat/contingency areas) without approval of HQ USAF/DPXVH.

* * *

Chapter 3
ASSIGNMENT AND TERMINATION OF PERMANENT PARTY BACHELOR HOUSING

* * *

3-4. Assignment of Bachelor Housing:

* * *

e. * * *

Military necessity may require the involuntary assignment of personnel to bachelor housing below the standard prescribed by this directive. Bachelor military personnel and civilian employees occupying such quarters involuntarily because of military necessity will not be authorized payment of BAQ/LQA.

* * *

15. PACAF Supplement 1, AFR 30-7 (September 16, 1975). [A-142].

AFR 30-7, 12 May 1975, is supplemented as follows:

* * *

2-2. The minimum adequacy standards for bachelor quarters in Thailand and Korea are waived.

STATEMENT OF THE CASE

Each Petitioner is seeking to recover his statutory entitlement to a basic allowance for quarters ("BAQ") provided by 37 U.S.C. §403(a) (1970), as amended, (Supp. 1980)[1/] for the period of time from January 27, 1970 through and including January 26, 1976 during which each member of the class was permanently stationed in Thailand.

Section 403(a) provides in pertinent part that "a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters" at a monthly rate specified by statute.

Respondent has admitted that each Petitioner was "a member of a uniformed service" and was "entitled to basic pay" within the meaning of §403(a) while permanently stationed in Thailand. (R. 94)[2/].

1/ All statutory citations hereinafter used will refer to Title 37, United States Code, unless otherwise indicated.

2/ Petitioners have requested the Clerk of the Northern District of Texas to transmit the entire record to the Clerk of this Court.

Respondent has admitted that no Petitioner received any BAQ while permanently stationed in Thailand. (R. 94-95).

Sections 403(b) and 403(c) enunciate the only statutory exceptions or limitations to the general entitlement provided by §403(a).

Respondent has admitted that the §403(c) exception to §403(a), dealing with "field duty" and "sea duty", is inapplicable to each Petitioner. (R. 94).

The §403(b) exception to the general entitlement provided by §403(a) is the central issue in this case. Section 403(b) provides in pertinent part that "a member of a uniformed service who is assigned to quarters . . . appropriate to his grade, rank, or rating and adequate for himself, . . . is not entitled to a basic allowance for quarters."

Petitioners and Respondent both recognize that any Petitioner who was not assigned to quarters "appropriate to his grade, rank, or rating and adequate" within the meaning of §403(b) is entitled to BAQ and that any Petitioner who was so assigned is not entitled to BAQ. Petitioners and Respondent differ on the criteria that

defines "appropriate to grade, rank, or rating and adequate" within the meaning of §403(b) as applicable to Petitioners in this case.

Section 403(j), formerly §403(g), provides that the "President may prescribe regulations for the administration of this section, including definitions of the words 'field duty' and 'sea duty.'" Executive Order 11157 is the only attempt by the President to exercise the authority delegated to him by §403(j).

Section 403 of Executive Order 11157 provides in pertinent part that "[a]ny quarters or housing facilities . . . in fact occupied without payment of rental charges . . . at his permanent station by a member without dependents . . . shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member. . . ."

Relying on the "any quarters" provision of Executive Order 11157, Respondent first argued that each Petitioner was precluded from his statutory entitlement to BAQ because each was assigned to government housing and paid no rent. Petitioners argued that

Executive Order 11157 was invalid to the extent that it purported to make occupancy itself or "any quarters" coequal with the statutory criteria of "appropriate to his grade, rank, or rating and adequate." Both the District Court and the Fifth Circuit concurred with Petitioners and held that the "any quarters" provision of Executive Order 11157 is invalid.

The District Court and the Fifth Circuit, however, both held that:

1. The President through Executive Order 11157 delegated his authority to establish standards governing "appropriate to his grade, rank, or rating and adequate" within the meaning of §403(b) to the Secretary of Defense;
2. The Secretary of Defense exercised this delegated authority by promulgating the series of Department of Defense Instructions No. 4165.47;
3. The Secretary of Defense redelegated this authority to the Secretary of the Air Force;
4. The Secretary of the Air Force exercised this authority by promulgating Air Force Manual 30-7, and later, Air Force Regulation 30-7;

5. The Secretary of the Air Force redelegated this authority to his major commands to reduce the standards for given geographical areas and/or for military reasons; and

6. PACAF, an overseas major command, exercised this redelegated authority by promulgating the series of PACAF Supplements.

The District Court further held that the PACAF reductions in the minimum adequacy standards to 110 square feet and subsequent waiver of all standards were proper and constituted the sole criteria to which a court should turn in determining if a Petitioner's quarters were "appropriate to his grade, rank, or rating and adequate" within the meaning of §403(b).

The Fifth Circuit affirmed the PACAF reductions in the minimum adequacy standards to 110 square feet agreeing that these reduced standards were the sole criteria to which a court should look in determining if the statutory criteria were met. The Fifth Circuit, however, reversed the District Court's ruling that PACAF could waive all minimum adequacy standards.

Both the District Court and the Fifth Circuit refused to attribute any legal significance to the undisputed fact that 98.1% of the housing to which Petitioners were assigned while stationed in Thailand was officially classified as "inadequate" or "substandard" to "accommodate the function" of housing officers according to the Air Force real property records maintained in accordance with validly enacted Air Force regulations.

Petitioners respectfully submit that the Fifth Circuit:

1. Erred in stating that "[i]n Executive Order No. 11,157 § 407, the President redelegated his authority under 37 U.S.C. § 403(j) to the Secretary of Defense and the Secretaries of the various services" to establish standards governing the § 403(b) exception to BAQ;

2. Erred in stating that the Secretary of Defense, the Secretary of the Air Force, and PACAF exercised "redelegated" authority to define adequacy "for BAQ purposes";

3. Erred in stating that the AF Forms 1430 are relevant to the present case only insofar as they can be "tied" to AFM 30-7 or AFR 30-7 by the express provisions of AFM 30-7 and AFR 30-7 themselves;

4. Erred in stating that the "purposes are different" insofar as they relate to BAQ for promulgation of ~~the AF Forms~~ 1430, AFM 30-7, AFR 30-7, and the PACAF Supplements; and

5. Erred in impliedly stating that the validity of the PACAF Supplements to govern BAQ was properly established by the summary judgment evidence in the record.

FEDERAL JURISDICTION

Section 1346(a)(2) of the Judicial Code, 28 U.S.C. §1346(a)(2), was the basis for federal jurisdiction in the United States District Court for the Northern District of Texas, which was the court of first instance.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioners submit that this Court should exercise its judicial discretion and grant a writ of certiorari

because of the special and important principles raised in this case. The criteria of Rule 17 of this Court are uniquely applicable here.

The Fifth Circuit itself recognized:

> The principles involved in this suit are of obvious importance.

The Iranian crisis, the Afghanistanian crisis, and the recent draft registration law have all accented the need for this country to develop and maintain a strong military. Military personnel and their compensation are inherently related to the development and maintenance of a strong military.

This case concerns Respondent's wholesale disregard of a statutory right granted to each of over six thousand Petitioners. This case involves the interpretation and legal effect of an Executive Order, Department of Defense Instructions, and Air Force Regulations in the light of the explicit Congressional commands embodied in 37 U.S.C. § 403.

Petitioners submit that the Fifth Circuit's opinion in this case conflicts with a Court of Claims decision involving essentially the same issues and further conflicts with two series of decisions of this Court.

First, the Fifth Circuit's opinion conflicts with the Court of Claims decision in Lischak v. United States, 202 Ct.Cl. 598 (1973). The Fifth Circuit's attempt to distinguish Lischak is utterly void of merit and emanates from an inherently faulty premise.

Second, the Fifth Circuit's opinion conflicts with Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); and United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954), all holding that Respondent itself is bound by the standards established by validly issued governmental regulations.

Third, the Fifth Circuit's opinion conflicts with the principles set forth in Bell v. United States, 366 U.S. 393 (1961); United States v. Andrews, 240 U.S. 90 (1916); and United States v. Symonds, 120 U.S. 46 (1887), all concerning attempts by Respondent to deny or curtail a statutory entitlement belonging as a matter of law to a member of a uniformed service.

A review of the statutory and regulatory scheme that creates the highly critical issues raised in this case should highlight the necessity for the granting of the writ prayed for by Petitioners so that this Court may

receive full and complete briefing in resolving these issues and fully comprehending the interrelationships of the statute with the various regulations in question.

Statutory and Regulatory Scheme

a. Congress established a statutory entitlement to BAQ. [§ 403(a)]. Each Petitioner's statutory right to receive BAQ is solely a question of status. "The monthly pay of officers is prescribed by statute, and so long as a person is an officer of the Army he is entitled to receive the pay belonging to the office. . . ." 13 OP. ATT'Y GEN. 103, 104. An officer cannot be divested of his pay and allowances through estoppel or waiver; for estoppels and waivers do not apply in the field of military compensation. United States v. Andrews, 240 U.S. 90 (1916).

> [I] t is to be observed that common-law rules governing private contracts have no place in the area of military pay. A soldier's entitlement to pay is dependent upon statutory right.

Bell v. United States, 366 U.S. 393, 401 (1961).

b. Congress established an exception to the statutory entitlement if quarters were assigned that were "appropriate to grade, rank, or rating and adequate." [§ 403(b)]. Respondent cannot declare "adequate" for BAQ purposes housing that is in fact inadequate or substandard and thereby nullify a Petitioner's statutory right to BAQ. United States v. Symonds, 120 U.S. 46, 48-50 (1887) ("[T]hat order could not convert the services of Symonds from sea services into shore services, if they were, in fact performed when 'at sea'").

c. AFM 93-1 (Ex. 887), AFM 87-18 (Ex. 885), and AFM 300-4, ADE Re-009 (Ex. 888) are all validly enacted governmental regulations. Respondent has never denied that the Secretary of the Air Force had the authority to promulgate these regulations.

AFM 93-1, AFM 87-18, and AFM 300-4, ADE Re-009 required the maintenance of Air Force Forms 1430 ("AF Forms 1430") for each building designated for the housing of officers. All of the AF Forms 1430 are part of the appellate record.

The applicable provisions of these regulations are set forth verbatim at the outset of this petition. In short, these regulations established standards or criteria for determining if housing was "adequate" or "substandard" to "accommodate the function" of housing officers. "[F]unctional adequacy, physical condition, structural adequacy, location, and adequate utility systems" were "the major elements of the determination." AFM 300-4, ADE Re-009 at 4-161 [Ex. 888].

Both the District Court and the Fifth Circuit recognized that 98.1% of the buildings to which Petitioners were assigned was classified less than "adequate" on the AF Forms 1430.

In Lischak v. United States, 202 Ct.Cl. 598 (1973), the Court of Claims held that Lischak was entitled to his BAQ for the period during which he was assigned to housing officially classified as less than "adequate" on the AF Form 1430 applicable to the building to which he was assigned.

Petitioners submit that Respondent cannot deem "adequate" for BAQ purposes quarters that

are officially classified on the AF Forms 1430, kept in accordance with validly enacted regulations, as less than "adequate" to serve the specific function of housing officers.

> Regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and this principle holds even when the administrative action under review is discretionary in nature.

Service v. Dulles, 354 U.S. 363, 372 (1957).

d. The Department of Defense Instructions, AFM 30-7, and AFR 30-7 delineated "minimum adequacy standards" for officers' housing. Few, if any, Petitioners were assigned to housing in Thailand that met these minimum adequacy standards.

Respondent contends that these minimum standards were reduced and subsequently waived in Thailand.

Petitioners submit that their statutory right to BAQ is not subject to divestiture through an administratively-imposed exclusion based upon geographical conditions or military necessity. This Court has consistently rejected administrative attempts to create geographical exclusions or

exceptions to statutory entitlements in the absence of explicit statutory authority. Morton v. Ruiz, 415 U.S. 199 (1974); Zuber v. Allen, 396 U.S. 168 (1969).

The legal conclusions of the courts below that extraneous exceptions can be imposed by administrative fiat upon Petitioners' statutory entitlement to BAQ is inconsistent with the statutory language and the concept of legal entitlements. "The contrary would be to hold that an executive department could annul and defy an act of Congress at its pleasure." Bell v. United States, 366 U.S. 393, 405 (1961).

e. Congress gave the President authority to prescribe regulations for the administration of § 403 that would include the authority to enact standards defining when quarters were "appropriate to grade, rank, or rating and adequate" within the meaning of § 403(b). [§ 403(j)].

f. Executive Order No. 11157 was the only attempt by the President to enact standards pursuant to § 403(j). The President stated that "any quarters

. . . in fact occupied without payment of rental charges . . . shall be deemed to have been assigned . . . as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member. . . ."

Executive Order No. 11157 delegated authority to the Secretary of Defense and the Secretary of the Air Force only to prescribe supplementary regulations not "inconsistent" with Executive Order No. 11157. Therefore, neither the Secretary of Defense nor the Secretary of the Air Force was ever delegated any authority to prescribe standards for BAQ pursuant to § 403(j).

g. Neither the Secretary of Defense nor the Secretary of the Air Force ever attempted to enact standards pursuant to § 403(j) that would define "appropriate to grade, rank, or rating and adequate" within the meaning of § 403(b). Neither ever had the authority to establish BAQ standards inconsistent with Executive Order No. 11157, and neither ever had the authority to authorize payment of BAQ if "any quarters" were assigned. Neither Department

of Defense Instruction No. 4165.47, nor AFM 30-7, nor AFR 30-7, nor the AF Forms 1430, nor the PACAF Supplements even purport to be enacted pusuant to § 403(j) or even purport to authorize payment of BAQ if the standards or criteria set forth in each are not met. Simply, no standards or criteria were ever promulgated pursuant to § 403(j) that defined when quarters would be considered "appropriate to grade, rank, or rating and adequate" within the meaning of § 403(b). The alleged need for any standards had been obviated by the "any quarters" provision in Executive Order No. 11157.

h. The Department of Defense Instructions 4165.47, AFM 30-7, and AFR 30-7 do not authorize the payment of BAQ if an officer is assigned to "any quarters", even if the quarters are inadequate.

> Members without dependents who occupy adequate or inadequate bachelor quarters, either voluntarily or involuntarily, will not be authorized payment of their BAQ. . . .
>
> Department of Defense Instruction 4165.47 (May 12, 1972 and October 23, 1974).

b. Basic Allowance for Quarters (BAQ). An amount of money, prescribed and limited by law, which an officer or airman receives to pay for quarters not provided by the government.

Air Force Manual 30-7 (January 1, 1970) and Air Force Regulation 30-7 (May 12, 1975).

These regulations were not intended to establish standards governing BAQ. The very nature of BAQ is misconceived. Each Petitioner has a statutory right to BAQ until that right is precluded by his assignment to housing that is "appropriate to his grade, rank, or rating and adequate."

The Department of Defense Instructions directly conflict with the statute and the Air Force regulations err in defining BAQ and when Congress demanded its payment.

i. Realizing that the "any quarters" provision in Executive Order No. 11157 was invalid, and both the District Court and Fifth Circuit have so held, and further realizing that no other standards were even purportedly enacted to govern BAQ, Petitioners recognized that a fact question was presented concerning whether the quarters to

which each was assigned in Thailand were "appropriate to his grade, rank, or rating and adequate" within the meaning of § 403(b).

In other words, with normal and plain word usage, were the quarters to which each was assigned "appropriate . . . and adequate" to serve their function of housing officers?

In answering this question, Petitioner turned to the only regulations concerning officers' housing that had been enacted by the Secretary of the Air Force, fully realizing that none of them purported to govern BAQ or to authorize payment of BAQ under any circumstances, in order to ascertain if the quarters were classified by the Air Force itself as adequate or fit to serve as officers' quarters.

j. The AF Forms 1430 (governed by AFM 93-1, AFM 87-18, and AFM 300-4, ADE Re-009), AFM 30-7, AFR 30-7, and the PACAF Supplements were found to be the only regulations enacted by the Air Force concerning whether housing was officially considered adequate or fit to serve its function of housing officers.

The AF Forms 1430 demonstrated that 98.1% of the buildings were officially classified as less than adequate (the same word found in the statute) "to accommodate the function" of housing officers. The AF Forms 1430 did indeed relate to the condition of the quarters.

AFM 30-7, AFR 30-7, and the PACAF Supplements established room and/or size standards referred to as the minimum adequacy standards. AFM 30-7 and AFR 30-7, from April 26, 1974 through January 26, 1976 also referred to adequacy of quarters in terms of "type of construction," an identical consideration of the AF Forms 1430.

Having examined the only regulations concerning the adequacy of the quarters to serve their purpose of housing officers, Petitioners realized that the Air Force itself had classified their quarters as inadequate to accommodate the function of housing officers.

Obviously, the Air Force did not intend that the adequacy standards set forth in either the AF

Forms 1430, or AFM 30-7, or AFR 30-7, or the PACAF Supplements would govern entitlement to BAQ. These regulations simply could not so provide without violating Executive Order No. 11157. But, the Air Force did intend, by the express provisions of its own regulations, to establish whether it considered the quarters adequate to house officers. The Air Force officially stated in documents compiled pursuant to its own regulations that Petitioners' quarters were inadequate to serve the function of housing officers. This determination answers the germane fact question that must be dealt with once it is recognized that no standards other than the "any quarters" standard of Executive Order No. 11157 were ever enacted by the Secretary of Defense or the Secretary of the Air Force pursuant to § 403(j).

k. Petitioners submit that a 110 square feet standard, a 250 square feet standard, or a 400 square feet standard, standing alone, would be unreasonable. Petitioners below did not focus on square footage per se because square footage is not the BAQ

standard. 110 square feet or 400 square feet of tent space in a rice paddy could hardly have been what Congress had in mind when it enacted § 403(b), particularly when the Air Force classified the square footage of what was actually assigned according to its own condition criteria as inadequate to accommodate the function of housing officers.

1. The Air Force is bound by its own determination pursuant to its own regulations that the quarters to which Petitioners were assigned were inadequate "to accommodate the function" of housing officers. The Air Force has never made any conflicting determination in any promulgated regulation that the quarters to which Petitioners were assigned were "adequate" for BAQ purposes. The Air Force itself simply had no occasion to consider adequacy or inadequacy, regardless of the size or condition of quarters, "for BAQ purposes" in light of the Presidential mandate in Executive Order No. 11157 that "any quarters . . . in fact occupied without payment of rental charges" precluded entitlement to BAQ.

Having set forth the statutory and regulatory scheme, Petitioners would now direct this Court's attention to the errors in the Fifth Circuit's opinion. Petitioners will address these points of error briefly to give this Court the flavor of the analysis hoping for the opportunity to address them more fully if the writ is granted.

The Fifth Circuit has written:

> In Executive Order No. 11,157 § 407, the President redelegated his authority under 37 U.S.C. § 403(j) to the Secretary of Defense and the Secretaries of the various services. Pursuant to this directive the Secretary of Defense promulgated Department of Defense Instruction No. 4165.47 (April 6, 1967; revised May 12, 1972; revised October 23, 1974) defining the minimum standards of adequacy for bachelor officers' housing.

Opinion at 3287. [emphasis supplied].

Purely and simply, the Fifth Circuit seriously erred in stating that "[i]n Executive Order No. 11,157 § 407, the President redelegated his authority under 37 U.S.C. § 403(j) to the Secretary of Defense and the Secretaries of the various services." The Fifth Circuit's subsequent legal reasoning flows solely from this inaccurate, erroneous factual statement, making it the single most critical error in the Fifth Circuit's entire opinion.

Executive Order No. 11157 never purported to delegate the Presidential authority found in § 403(j) to enunciate standards governing entitlement to BAQ to "the Secretary of Defense or the Secretaries of the various services." The explicit provisions of Executive Order No. 11157 itself highlight the erroneous nature of the Fifth's Circuit statement.

Executive Order No. 11157 provides in pertinent part:

> Sec. 403. Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payment of rental charges . . . shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member . . . .
>
> * * *
>
> Sec. 407. The Secretaries concerned . . ., with respect to personnel of the uniformed services within their respective departments, are hereby authorized to prescribe such supplementary regulations not inconsistent herewith as they may deem necessary or desirable for carrying out these regulations . . . . [emphasis supplied].

Executive Order No. 11157 delegated authority to the Secretary of Defense and the Secretaries of the various services, including the Secretary of the Air

Force, "to prescribe such supplementary regulations not inconsistent herewith" after already expressly stating that for purposes of § 403 "[a]ny quarters . . . in fact occupied without payment of rental charges . . . shall be deemed to have been assigned . . . as appropriate and adequate, and no basic allowance for quarters shall accrue . . . ." Never does Executive Order No. 11157 purport to redelegate Presidential authority under § 403(j) to the Secretaries of the various services to enunciate standards governing entitlement to BAQ.

In Executive Order No. 11157, the President intended to enunciate the "standard" governing entitlement to BAQ by providing that "[a]ny quarters . . . in fact occupied . . . shall be deemed to have been assigned . . . as appropriate and adequate, and no basic allowance for quarters shall accrue to such member . . . ." The Secretary of the Air Force could not have established fifty square feet of living space as the controlling standard for BAQ, which, if not met, would entitle a Petitioner to payment of his BAQ, without defying Executive Order No. 11157, without going beyond his authority, and without prescribing a regulation that

inherently would be "inconsistent" with Executive Order No. 11157.

Premised on the erroneous statement that "[i]n Executive Order No. 11,157 § 407 the President redelegated his authority under 37 U.S.C. § 403(j) to the Secretary of Defense and the Secretaries of the various services," the Fifth Circuit then concluded that the Secretary of Defense through promulgation of Department of Defense Instruction No. 4165.47; the Secretary of the Air Force through promulgation of AFM 30-7 and later AFR 30-7; and PACAF through promulgation of the PACAF Supplements exercised this "redelegated" Presidential authority to establish standards or criteria defining "appropriate to grade, rank, or rating or adequate" within the meaning of § 403(b).

The faulty initial premise that the President "redelegated" his authority under § 403(j) to define BAQ standards permeates the Fifth Circuit's subsequent conclusions predicated on that premise thereby compounding the initial error.

Did the Secretary of Defense in promulgating the minimum adequacy standards delineated in Department

of Defense Instruction No. 4165.47; or the Secretary of the Air Force in promulgating the minimum adequacy standards delineated in AFM 30-7, or later in AFR 30-7; or PACAF in promulgating the 110, net square feet standard, intend to establish standards governing BAQ that were different or "inconsistent" with the express "any quarters" provision of Executive Order No. 11157? If so, where does either Secretary or PACAF derive this authority?

Did the Secretary of Defense, the Secretary of the Air Force, or PACAF authorize or even purport to authorize the payment of BAQ to a member of a uniformed service who was not furnished quarters meeting the "minimum adequacy standards" in Department of Defense Instruction No. 4165.47, AFM 30-7, AFR 30-7, or the 110 net square feet standard in the PACAF Supplements? If so, where is that purported authorization written or spelled out in the text of Department of Defense Instruction No. 4165.47, AFM 30-7, AFR 30-7, or the PACAF Supplements?

Could the Secretary of Defense, the Secretary of the Air Force, or PACAF have even purported to

authorize payment of BAQ to a member of a uniformed service who was assigned to quarters not meeting the "minimum adequacy standards" in Department of Defense Instruction No. 4165.47, AFM 30-7, AFR 30-7, or the 110 net square feet standard in the PACAF Supplements when the member was in fact assigned to "any quarters" without defying Executive Order No. 11157?

In short, only Executive Order No. 11157 even purported to exercise the Presidential authority granted under § 403(j) to enact standards defining "appropriate to grade, rank or rating and adequate" within the meaning of § 403(b). Executive Order No. 11157 only delegated authority to "prescribe supplementary regulations not inconsistent" with Executive Order No. 11157. The Secretary of Defense, the Secretary of the Air Force, and PACAF were all without authority to prescribe any standards governing BAQ. Neither the Secretary of Defense, nor the Secretary of the Air Force, nor PACAF ever stated that BAQ would be paid if the "minimum adequacy standards" or reduced standards were not met. Neither the Secretary of Defense, nor the Secretary of

the Air Force, nor PACAF ever purported to enact standards governing entitlement to BAQ. No supplementary regulation could have been lawfully prescribed by any of them "inconsistent" with the "any quarters" standard articulated in Executive Order No. 11157 itself.

The Fifth Circuit also wrote that the "minimum adequacy standards" set forth in Department of Defense Instruction No. 4165.47, AFM 30-7, and AFR 30-7, together with the PACAF Supplements reducing the "minimum adequacy standards" for Thailand to 110 net square feet, are the exclusive standards governing adequacy "for BAQ purposes." These regulations simply do not provide that they govern adequacy for BAQ purposes.

Having stated that the "minimum adequacy standards" and the PACAF reduced standards govern BAQ because they were allegedly enacted pursuant to authority redelegated by the President under § 403(j), a statement Petitioners have shown is erroneous, the Fifth Circuit concluded that the AF Forms 1430 are relevant to adequacy "for BAQ purposes" only insofar as they can be "tied" to AFM 30-7 or AFR 30-7 by the express provisions of AFM 30-7 or AFR 30-7 themselves.

First, the Fifth Circuit attempted to distinguish Lischak v. United States, 202 Ct.Cl. 598 (1973) by suggesting that Lischak was awarded his BAQ on the basis of the determination in the AF Form 1430 only because the August 1, 1967 edition of AFM 30-7 allegedly contained "a specific definition of 'adequate' and 'inadequate' quarters for BAQ purposes" [Opinion at 3290], whereas allegedly "the Air Force [during the period applicable to this case] cancelled the regulation that tied 'adequacy' for BAQ purposes to the real property records . . . ." [Opinion at 3290].

Simply, the August 1, 1967 edition of AFM 30-7 considered in Lischak made no more reference to "adequacy" "for BAQ purposes" than either the January 1, 1970 edition of AFM 30-7 or the May 12, 1975 edition of AFR 30-7 makes to "adequacy" "for BAQ purposes." The Lischak opinion does not even suggest that the August 1, 1967 edition of AFM 30-7 governed BAQ or that Lischak was awarded his BAQ because the AF Form 1430 was referenced in AFM 30-7. Lischak was awarded his BAQ because of the factual determination embodied in the AF Form 1430 that his quarters were officially

classified as less than adequate to house officers. The Secretary of the Air Force had no more authority in 1967 to enact standards governing BAQ that would have been "inconsistent" with the "any quarters" provision of Executive Order No. 11157 than the Secretary had in 1970 or in 1975 to enact "inconsistent" standards. Lischak simply cannot be accurately or justifiably distinguished on the basis that the August 1, 1967 edition of AFM 30-7 governed adequacy "for BAQ purposes" tying itself to the AF Forms 1430, whereas the tying arrangement for the present time period has been "cancelled." Nothing in the August 1, 1967 edition of AFM 30-7 purported to establish "adequacy" "for BAQ purposes" any more than the January 1, 1970 edition of AFM 30-7 or the May 12, 1975 edition of AFR 30-7 purported to establish "adequacy" "for BAQ purposes."

Adequacy "for BAQ purposes" has never been "tied" to the AF Forms 1430 through AFM 30-7 or AFR 30-7 any more than adequacy "for BAQ purposes" has been "tied" to AFM 30-7 or AFR 30-7 through the AF Forms 1430.

The factual determination, however, embodied in the AF Form 1430 that Lischak's quarters in Korea were officially classified as less than adequate "to accommodate the function" of housing officers is the identical factual determination embodied in the AF Forms 1430 applicable to 98.1% of the buildings to which Petitioners were assigned in Thailand.

Second, the Fifth Circuit attempted to nullify the legal effect of the finding evidenced by the AF Forms 1430 that 98.1% of the housing to which Petitioners were assigned was classified less than "adequate" to "accommodate the function" of housing officers by stating that "their purposes are different," referring to a distinction between the AF Forms 1430 [and the regulations governing them] and AFM 30-7 and AFR 30-7, even though both refer to "adequacy," the same word used in the statute. This conclusion is likewise premised upon the erroneous statement that the President "redelegated" his authority under § 403(j) to the Secretary of the Air Force who exercised this allegedly "redelegated" authority by enacting the "minimum adequacy standards" in AFM 30-7 and AFR 30-7 that constitute the exclusive criteria for "adequacy" "for BAQ purposes."

The Secretary of the Air Force did not intend the adequacy standards set forth in either the AF Forms 1430, or AFM 30-7, or AFR 30-7, or the PACAF Supplements would govern entitlement to BAQ. These regulations simply could not so provide without violating Executive Order No. 11157.

There is no more basis in the record for concluding that AFM 30-7, or AFR 30-7, govern BAQ to the exclusion of the AF Forms 1430 than there is for concluding that the AF Forms 1430 govern BAQ to the exclusion of AFM 30-7, or AFR 30-7. There is no basis in this record for concluding that the purpose of the AF Forms 1430 differs from the purpose of AFM 30-7, or AFR 30-7, insofar as any of these regulations evidence a purpose to govern BAQ.

The AF Forms 1430, however, here as in Lischak, expressly state that their purpose is to officially classify housing used for officers' quarters according to its fitness to "accommodate the function" of housing officers. The determination that 98.1% of Petitioners' housing was officially classified as less than adequate for the purpose of housing officers answers the germane

inquiry once it is recognized that no standards other than the "any quarters" standard of Executive Order No. 11157 were ever enacted by the Secretary of Defense or the Secretary of the Air Force pursuant to § 403(j).

Likewise premised on its erroneous conclusion concerning redelegation of authority to establish BAQ standards, the Fifth Circuit held that PACAF's reduction of the minimum adequacy standards in AFM 30-7 and AFR 30-7 for Thailand to 110 square feet constituted a controlling determination of adequacy for BAQ. The Fifth Circuit stated that the military might "take into account in considering adequacy [for BAQ purposes] . . . the facts of climate . . . [and] the military, economic and social environment in [Thailand]." [Opinion at 3291].

One, the Fifth Circuit failed to recognize that PACAF had authority to reduce the "minimum adequacy standards" for occupancy only because of military necessity. AFM 30-7, paras. 2-2, 3-4 at 2-1, 3-4 (1970); AFR 30-7, paras. 2-2, 3-4f at 2-1, 3-4 (1975).

Two, nothing in the record indicates that PACAF's purported reduction in the minimum adequacy standards

was intended to establish a new standard for BAQ or took into account the facts of climate and/or the military, economic, or social environment in Thailand, even if it be assumed that PACAF had any such authority.

Even if this Court should ultimately conclude that PACAF had "redelegated" authority under § 403(j) to establish standards governing BAQ applicable to Thailand based upon factors of climate, and/or the military, economic and social environment in Thailand, then a fact question is presented that should be determined on remand concerning whether PACAF did in fact establish the 110 net square feet standard intending that it govern BAQ after considering "the facts of climate [and] the military, economic and social environment in [Thailand]." This question has not been answered as a matter of law on the basis of any evidence in the record. The summary judgment is therefore unjustified and erroneous.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 1980, three copies of this Petition for Writ of Certiorari were mailed postage prepaid, to Robert M. Hollis, U. S. Department of Justice, 550 11th Street N.W., #716-A, Washington, DC 20530, counsel for Respondent. I further certify that all parties required to be served have been served.

Kenneth M. Morris

Kenneth M. Morris

Supreme Court, U. S.
FILED
JUL 16 1980
MICHAEL RODAK, JR., CLERK

No. 80-118

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

KERRY P. DAY; RHETT G. CAMPBELL;
RICHARD D. HUFF; PETER H. LUKE;
PAUL M. SCOTT; JAMES A. TERHUNE;
and all others similarly situated,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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July 16, 1980

APPENDIX

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1.	Day v. United States, 441 F.Supp. 165 (N.D. Tex. 1977)	A-1
2.	Day v. United States, unreported, (5th Cir. 1980)	A-17
3.	Fifth Circuit's Order Denying Rehearing	A-39

Note:

Petitioners have also filed an Appendix that contains copies of all of the regulations cited in their PETITION FOR WRIT OF CERTIORARI. This filing necessarily does not conform to the size requirements of the present Appendix. The Clerk has advised that copies of the Appendix containing the regulations will be kept in the Clerk's office and made available upon request.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

KERRY P. DAY, RHETT G. CAMPBELL, RICHARD D. HUFF, PETER H. LUKE, PAUL M. SCOTT, JAMES A. TERHUNE, Plaintiffs, on behalf of themselves and all others similarly situated, V. UNITED STATES OF AMERICA, Defendant.	X X X X X X X X X X X X X X X X	CIVIL ACTION NO. 4-76-21

MEMORANDUM AND ORDER

MAHON, District Judge.

Plaintiff brought this suit against the government to recover Basic Allowance for Quarters (hereinafter BAQ) pursuant to 37 U.S.C. § 403. There being no genuine issues of fact, both parties moved for summary judgment. Jurisdiction is present under 28 U.S.C. § 1346(a)(2).

Plaintiffs represent the class of all unmarried officers without dependents who, while serving in the Air Force, were permanently stationed in Thailand during some portion of the period from January 27, 1970 through January 26, 1976 and who were assigned to quarters of the United States or housing facilities under the jurisdiction of the Department of the Air Force. They assert that they are entitled to recover BAQ payments as provided by 37 U.S.C. § 403 for the period during which they were permanently assigned to Thailand. 37 U.S.C. § 403 in relevant part provides:

> (a) Except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the monthly rates prescribed in accordance with § 1009 of this title, according to the pay grade in which he is assigned or distributed for basic pay purposes.
>
> (b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. However, except as provided by regulations prescribed under subsection (j) of this section, a commissioned officer without dependents who is in a pay grade above pay grade 0-3 and who is assigned to quarters of

> the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade or rank and adequate for himself, may elect not to occupy those quarters and instead to receive the basic allowance for quarters prescribed for his pay grade by this section.
>
> * * *
>
> (j) The President may prescribe regulations for the administration of this section, including definitions of the words "field duty" and "sea duty."[1]

It is Plaintiffs' contention that the quarters they received in Thailand were not "appropriate to [their] grade, rank or rating and adequate for [themselves]." Therefore, the Plaintiffs argue, since they are not within the exclusion of 37 U.S.C. § 403(b), they were entitled to BAQ payments under 37 U.S.C. § 403(a). The aggregate payments are estimated to be in excess of twenty million dollars ($20,000,000.00).

I.

The Government's first argument in support of its motion for summary judgment is that Plaintiffs' quarters

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1. The statute did not remain constant throughout the period of this suit--January 27, 1970 to January 26, 1976. From January 27, 1970 to 1974, subsection (a) contained a table of BAQ payments. Also, prior to 1973, subsection (j) was designated subsection (g). None of these changes affect the merits of the summary judgment motions.

were adequate as a matter of law because of Executive Order No. 11157 § 403,[2] issued pursuant to 37 U.S.C. § 403(j). It is stipulated that all of the Plaintiff class lived in government facilities and that none paid any rent.

Plaintiffs contend that the Executive Order is not controlling in that it is inconsistent with the statute. The effect of the Executive Order No. 11157 is clearly to read the phrase "appropriate to his grade, rank, or rating and adequate for himself" out of the statute. Under the Executive Order, any quarters provided by the government are by definition adequate. This could hardly be what Congress intended when they enacted 37 U.S.C. § 403. The President was given the power in 37 U.S.C. § 403(j) (formerly (g)) to prescribe regulations for the administration of § 403. Such a delegation did not,

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2. Executive Order No. 11157 § 403 (1964):

> "Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payments of rental charges . . . (b) at his permanent station by a member without dependents . . . shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such members under such circumstances."

however, give him the right to emasculate a portion of the Congressional mandate.

In United States v. Symonds, 120 U.S. 46, 7 S.Ct. 411, 30 L.Ed. 557 (1886) the Secretary of the Navy issued an order that certain ships were not to be considered in commission for sea duty. The effect of that order was to reduce Symond's pay to "shore service" level rather than "sea duty."

> But Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was, in fact, sea service, or to increase his compensation by declaring that to be sea service which was, in fact, shore service. The authority of the Secretary to enter orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court.

Id. at 49, 7 S.Ct. at 412.

The President's power to administer the BAQ statute is derived solely from that act and must, there-

fore, be consistent with the intent of Congress. Any Executive Order in conflict with the statute, as this one is, cannot be controlling. See Townsend v. Swank, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971); Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936); Real v. Simon, 510 F.2d 557 (5th Cir. 1973). Therefore, the Government's first argument in support of its motion for summary judgment must be rejected.

II.

In their cross-motion for summary judgment, Plaintiffs argue that the Air Force, on its own form 1430,[3] has itself defined Plaintiffs' quarters, as well as 98.1%[4] of the buildings used to house officers in Thailand, as inadequate. Plaintiffs rely on Lischak v.

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3. Forms 1430 are the Air Force real property records. Each building designated as officers' quarters was classified as to its condition on a Form 1430. The classes were as follows: (1) Usable—Class A (Adequate); (2) Usable—Class B (Substandard); (3) Forced Use (Substandard); (4) Sterile; and (5) Unusable.

4. The records on file show that 98.1% of the buildings designated for use as officers' quarters in Thailand during the applicable period were classified as substandard or worse on the Form 1430 real property records.

United States, 202 Ct.Cl. 598 (1974) for the proposition that an Air Force determination in the real estate records that a building is inadequate controls BAQ entitlements.

Plaintiffs' reliance is misplaced. During 1968, the time involved in the Lischak case, Air Force Manual 30-7 (hereinafter AFM 30-7), implementing 37 U.S.C. § 403, defined adequate quarters as those that are classified "Usable—Class A" and that meet the minimum standards of adequacy to be classified as Condition Code 1 on the real property records.[5] Clearly the real estate records were meant to define adequacy for the purposes of BAQ. Since the Air Force had classified Lischak's quarters "Usable--Class B," under the applicable regulation this meant those quarters had been defined by the Secretary as inadequate, and under the statute Lischak was thereby entitled to BAQ. Lischak, at 606-7.

Since the Lischak case, AFM 30-7 has been re-written. No longer is adequacy for BAQ purposes tied to

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5. Lischak v. U. S., 202 Ct.Cl. 598, 614 (1974), Finding 14.

the real estate records. This clearly distinguishes the Lischak case. Throughout the period involved in this suit AFM 30-7 (and later Air Force Regulation 30-7) defined adequacy for BAQ purposes in terms of square feet of living space. Plaintiffs, in their brief in support of their motion for summary judgment concede that AFM 30-7 and AFR 30-7 standards are applicable and controlling. (Plaintiffs' brief at 29.) While Form 1430 real estate records still exist, they are no longer tied into 37 U.S.C. § 403 by regulation. As shown by the affidavit of Major General William Gilbert, Form 1430 represents an assessment by the Air Force of a building's structural adequacy from an engineering standpoint. Unlike Lischak, at no time during the Plaintiffs' overseas service has there been any regulation in force that links Form 1430 and BAQ. The Court is, therefore, of the opinion that a determination of structural inadequacy in real property records is not an official decision that quarters are inadequate for BAQ purposes.

III.

In support of its alternative motion, the Government asks this Court to grant summary judgment

as to all the members of Plaintiff class who had at least 110 square feet of net living area (excluding bathing and toilet facilities).

After Congress delegated the authority to administer 37 U.S.C. § 403 to the President in § 403(j) (formerly § 403(g)), the President, in Executive Order No. 11157 § 407 (1964), in turn redelegated the authority to the Secretary of Defense and the Secretaries of the various services. Pursuant to this directive the Secretary of Defense promulgated Department of Defense Instruction No. 4165.47, a series of regulations which defined the minimum standards for adequacy in bachelor officers housing. These Department of Defense regulations provided that the minimum standards for adequacy of bachelor housing were to apply worldwide "unless specific exceptions are made by the Head of the DoD [Department of Defense] Component concerned." The Air Force issued Air Force Manual 30-7 (AFM 30-7) on January 1, 1970 to carry out the Department of Defense Instruction 4165.47. AFM 30-7 was superseded by Air Force Regulation 30-7 (AFR 30-7) on May 12, 1975. Both AFR 30-7 and AFM 30-7 required that

officers at a grade level of 0-1 or 0-2 were to receive 250 square feet of living space while 0-3 officers and above were to get 400 square feet consisting of a bedroom, living room, bath and kitchen. These are the same minimum standards set by the DoD Instruction 4165.47 of May 12, 1972.

In accordance with the proviso for specific exceptions contained in the DoD Instruction, the Secretary of the Air Force in paragraphs 2-2 of AFM 30-7 and AFR 30-7 stated that with respect to the minimum standards of adequacy set forth by those regulations: "Oversea major commands may make appropriate reductions in these standards for areas involved in combat or contingency operations or areas directly supporting these operations."

Pursuant to this delegation of authority, the Headquarters for the Pacific Air Forces (hereinafter PACAF) as a major overseas command issued a series of supplementary regulations to AFM 30-7 and AFR 30-7 between April 17, 1969 and September 16, 1975. These PACAF Supplements established a minimum adequacy standard in Thailand of 110 square feet per single officer

exclusive of bathing and toilet facilities.[6] On September 16, 1975 the last PACAF Supplement was issued which waived all minimum standards for housing officers permanently stationed in Thailand. This was, apparently, done as a result of the imminent discontinuance of American use of Royal Thai Air Force bases.

The chain of delegated authority went from Congress to the President to the Department of Defense to the Air Force and finally to the Headquarters for the Pacific Air Force. The PACAF thereupon determined that, in Thailand, bachelor officers' quarters comprising 110 square feet per person would be considered "appropriate to [the officer's] grade, rank, or rating and adequate for himself" within the meaning of 37 U.S.C.

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6. It may be noted that throughout the long history of BAQ payments "adequacy" has always been defined in terms of pure objective standards such as the number of rooms (See regulations of 1813 through 1922 quoted in Jones v. United States, 60 Ct.Cl. 552, 555-562 (1925), See also Hollister v. United States, 92 Ct.Cl. 137 (1940)), or square footage available per officer (See AFM 30-7 and AFR 30-7; Lischak v. United States, 202 Ct.Cl. 598 (1973)). In no military regulation or federal case was quarters deemed inadequate solely on the basis of some subjective standard such as condition of the quarters, construction type, furnishings provided, etc.

§ 403(b). Unlike Executive Order No. 11157, the Air Force regulations defining "adequacy" are not inconsistent with the Congressional mandate in 37 U.S.C. § 403. They are, therefore, entitled to great weight. Billings v. Truesdell, Kansas, 321 U.S. 542, 64 S.Ct. 737, 88 L.Ed. 917 (1944); United States v. Public Utilities Commission of Cal., 345 U.S. 295, 73 S.Ct. 706, 97 L.Ed. 1020 (1953).

Plaintiffs do not quarrel with the right of the Air Force to prescribe the definition of adequate housing found in AFM 30-7 and AFR 30-7 (400 square feet for 0-3 officers and above and 250 square feet for 0-1 and 0-2 officers). Their complaint is that paragraphs 2-2 of AFM 30-7 and AFR 30-7 are invalid to the extent that they purport to engraft geographical or military exceptions to the 400 and 250 square foot minimum requirements for adequacy of quarters. The question comes down to whether the provision in DoD Instruction 4165.47 for reduction of minimum standards for "areas involved in combat or contingency operations or areas directly supporting these operations" is valid. If it is, then the reduction by PACAF to 110 square feet per officer and

finally the waiver of all minimum adequacy standards after September 16, 1975 are also valid. The movement and housing of troops is strictly a military matter so long as the Constitution or federal law is not violated. The decision whether to construct permanent housing for military personnel is one that depends on the particular circumstances involved. It would be unrealistic to require worldwide uniformity in housing regardless of the circumstances or conditions. Decisions such as the size of officers' quarters in a combat or support area is the type of decision that should be left to the military, not the Federal Courts.

> The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. Orloff v. Willoughby, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953).

In Gilligan v. Morgan, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1972), the Supreme Court said:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible--as the Judicial Branch is not--to the electoral process. Moreover, it

> is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Id. at 10, 93 S.Ct. at 2446.

The Headquarters for the Pacific Air Force under its authority delegated through channels from the President, has defined adequate quarters for 37 U.S.C. § 403. Geographical exceptions based on military necessities are neither unreasonable nor arbitrary. The Air Force has the right to reduce standards of housing for personnel in troubled areas. The 110 square feet minimum standard in Thailand promulgated by the PACAF is a valid regulation and controlling this case. Under Plaintiff's interpretation the military's hands would be tied. Either massive housing projects would have to precede any American military presence or millions of dollars in BAQ payments would be the price of quick action. This Court is unwilling to impose such a burden on the military. Accordingly, the Government's motion for summary judgment must be granted as to all members of Plaintiff class who received 110 square feet

or more per officer while in Thailand between January 27, 1970 and September 16, 1975.

The Court is also of the opinion that military necessity may sometimes dictate the suspension of all minimum standards of adequacy as was done in Thailand on September 16, 1975. All claims for BAQ payments based on service in Thailand after that date must, therefore, also be dismissed.

IV.

As the Government points out, it is unclear whether any of the Plaintiff class every [sic] received less than 110 square feet. It is possible that granting the Government's partial summary judgment will obviate any consideration of Plaintiffs' cross-motion for summary judgment. The Court feels that it must, therefore, refrain from ruling on the Plaintiffs' motion until it is convinced that some members of the Plaintiff class remain in the case. A hearing must be held at a later date during which any member of the class may attempt to show that he is not within the subclass of dismissed Plaintiffs.

It is, therefore, ORDERED that the Government's Motion for Summary Judgment as to the subclass of Plaintiffs who received 110 square feet or more be, and hereby is, granted.

It is further ORDERED that summary judgment be, and hereby is, granted against all claims based on service in Thailand after September 16, 1975.

It is further ORDERED that Plaintiffs' cross-motion for summary judgment be neither granted nor denied pending a later hearing on the remaining members of the Plaintiff class.

Judgment will be entered accordingly.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1092

KERRY P. DAY; RHETT G. CAMPBELL;
RICHARD D. HUFF; PETER H. LUKE;
PAUL M. SCOTT; JAMES A. TERHUNE;
and all others similarly situated,
Appellants,

V.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

"Join the Navy, and see the world" was once the seductive slogan to enlistment. Service in the other branches of the armed forces may also entail assignment to distant and exotic posts. Whether on duty in the United States or at far-off bases, a commissioned officer is entitled by act of Congress to quarters "appropriate to his grade, rank, or rating and adequate for himself." 37

U.S.C. § 403(b). If these are not provided, he is entitled to be paid a monetary sum, a basic allowance for quarters (BAQ).[1]

This is a class action on behalf of all unmarried Air Force officers without dependents who were perma-

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1. 37 U.S.C. § 403 provides in part:

> (a) Except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the monthly rates prescribed in accordance with section 1009 of this title, according to the pay grade in which he is assigned or distributed for basic pay purposes.
>
> (b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters.
>
> * * *
>
> (j) The President may prescribe regulations for the administration of this section, including definitions of the words "field duty" and "sea duty".

The statute did not remain constant throughout the period of this suit. Until 1974, subsection (a) contained a table of BAQ payments. Also, prior to 1973, subsection (j) was designated subsection (g). None of these changes affect the issues here.

nently stationed in Thailand and provided quarters there during the six year period from January 27, 1970 through January 26, 1976. None was on field or sea duty; and therefore, none was deprived of BAQ by the statutory exemption for military personnel so assigned, 37 U.S.C. § 403(c). Each was provided with quarters that he occupied, but the class action claims that what was supplied was not adequate and appropriate and, therefore, claims BAQ payments as provided by 37 U.S.C. § 403 for the duration of each member's permanent assignment in Thailand.[2]

Both parties were trained for lightning battles. The government sought to bomb the plaintiffs out of court by motion for summary judgment dismissing their case. It contended that each plaintiff was in fact provided some quarters and that anything actually supplied was legally sufficient under an executive order and a military regulation; alternatively, it relied on

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2. The principles involved in this suit are of obvious importance. In addition, the district court noted that the total claim amounted to approximately $20,000,000. Since no individual claim exceeds $10,000, jurisdiction was properly based on 28 U.S.C. § 1346(a)(2).

another regulation that defines all quarters containing 110 square feet of net living area (excluding bathing and toilet facilities) as adequate in Thailand. Equally determined to win quick victory, the plaintiff class countered with a motion for summary judgment on the grounds that all quarters provided were patently inadequate because 98.1% of the buildings used to house officers in Thailand were classified in some category other than "Usable--Class A (Adequate)" in the real property records maintained by the Air Force, Form 1430, and because none of the quarters met the minimum adequacy standards for bachelor quarters generally applicable when quarters are assigned in the United States.

Until September 16, 1975, each class member was provided with quarters embracing at least 110 square feet. The district court held that these were adequate as a matter of law without regard to their actual condition. On September 16, a military regulation suspended all minimum standards of adequacy. Holding that this was dictated as well as justified by military necessity, the district court also dismissed the claims subsequent to that date.

The case comes to us without any factual determinations concerning the adequacy of what was provided. We review only the summary judgment, which

held, as a matter of law, that the Air Force's regulatory prescriptions were within the authority delegated by the statute.

Before discussing the two sets of rules that cover the two separate time periods, we consider the government's first-strike argument: "It is stipulated that the plaintiffs were each assigned some kind of quarters and paid no rent." The statutory section providing for BAQ gives the President power to prescribe regulations for its administration. 37 U.S.C. § 403(j). Pursuant to that grant of authority, the President issued Executive Order No. 11,157, a section of which says simply that any quarters occupied rent free at an officer's permanent station "shall be deemed . . . appropriate and adequate."[3]

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3. Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payments of rental charges . . . (b) at his permanent station by a member without dependents . . . shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such members under such circumstances. . . .

Exec. Order No. 11,157 § 403, 29 Fed. Reg. 7973 (1964), reprinted as amended in 37 U.S.C. § 301 note, at 647-652 (1977).

Therefore, the government argues, the quarters were ipso facto adequate.

The district court properly grounded this sophistry. The general rule enacted by Congress is that all officers are entitled to BAQ; there is no exception to the legislative mandate when adequate and appropriate quarters are provided. The power to make regulations defining what is adequate and appropriate is not a delegation of authority to wipe out the statute by imposing an Orwellian definition that adopts no standard at all. Regulations must be consistent with the statutory authority that alone gives them validity. Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 746, 93 S.Ct. 1773, 1785, 36 L.Ed.2d 620, 634 (1973) (quoting Volksvagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090, 1097 (1968)); Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936); United States v. Symonds, 120

U.S. 46, 7 S.Ct. 411, 30 L.Ed. 557 (1887); Real v. Simon, 510 F.2d 557, 564 (5th Cir. 1975). They may lack rhyme, and, unfortunately, sometimes are turgid, but they must be based on some kind of reason.

The government's argument in support of the non-standard effective on September 16, 1975 is almost as untenable. Pursuant to a series of delegations of power, from the President to the Secretary of the Department of Defense, to the Secretary of the Air Force, to oversea major commands, the Headquarters for Pacific Air Forces (PACAF) waived all minimum standards for housing officers permanently stationed in Thailand on September 16, 1975. This was, the district court found, "apparently done as a result of the imminent discontinuance of American use of Royal Thai Air Force bases." (Emphasis supplied.) It considered this change a matter of military necessity, hence valid.

Even assuming the validity of the factual premises, we must reach a different conclusion. The Congressional command is to pay BAQ to all those not on field duty unless they are provided with quarters adequate and appropriate. Military necessity justifies assignment of

personnel to field duty, but the statute contains no military-necessity exception from the BAQ requirement for those assigned to a permanent station wherever that station may be or under whatever conditions the assignment may occur. The statute did not authorize the Chief Executive to suspend the payment of BAQ if political or military exigencies made it difficult or inexpedient to provide what was adequate and appropriate; not did it authorize him to accomplish the same result by sprinkling a few regulatory words.

There is, therefore, no real difference between the dogmatic Executive Order 11,157 that "everything provided is adequate" and the PACAF order that "after September 16, everything in Thailand is adequate," save that the later order deals with a specific geographic area and a shorter time period. The result decreed in 1975 was as imperious as the universal command that anything the military provides suffices; neither defines what is adequate or appropriate in any fashion or attempts in any way to meet the implicit statutory standard. See United States v. Cartwright, 411 U.S. 546, 93 S.Ct. 1713, 36 L.Ed.2d 528 (1973); cf. Townsend v. Swank, 404

U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971); Bell v. United States, 366 U.S. 393, 81 S.Ct. 1230, 6 L.Ed.2d 365 (1961).

Let us turn now to the period before September 16, 1975. In Executive Order No. 11,157 § 407 the President redelegated his authority under 37 U.S.C. § 403(j) to the Secretary of Defense and the Secretaries of the various services. Pursuant to this directive the Secretary of Defense promulgated Department of Defense Instruction No. 4165.47 (April 6, 1967; revised May 12, 1972; revised Oct. 23, 1974) defining the minimum standards of adequacy for bachelor officers' housing. This Instruction establishes standards applicable worldwide "unless specific exceptions are made by the Head of the DoD [Department of Defense] Component concerned." Id. ¶ IV(B) (May 12, 1972).[4]

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4. Prior to 1972 DoD Instruction 4165.47 did not contain the exception quoted but rather provided that its standards were applicable only at "such permanent overseas installations as may be designated by the Secretaries of the Military Departments." The officers make no claim that it applied to Thailand. The only relevant regulation applicable to Thailand before 1972 was therefore AFM 30-7, described below. Since AFM 30-7 is also applicable and controlling after 1972, the change in DoD Instruction 4165.47 is irrelevant to this appeal. See Lischak v. United States, 202 Ct.Cl. 598, 613 (1973).

The Secretary of the Air Force subsequently issued regulations requiring that officers at the pay level of 0-1 or 0-2 (1st and 2nd Lieutenants, respectively) were to receive 250 squre feet consisting of a combined bedroom and living room and private bath. Officers at pay level 0-3 and higher (Captain and above) were to receive 400 square feet consisting of a private bedroom, a private bath, a shared living room and a shared kitchen. Air Force Manual (AFM) 30-7, Change 1 ¶ 2-4 (April 26, 1974); Air Force Regulation (AFR) 30-7, Table 2-1 (May 12, 1975).[5] These same minimum standards were set by the DoD Instruction 4165.47 of May 12, 1972. They contain no reference to the physical condition of the quarters or the services provided, defining adequacy solely in terms of number of rooms and square footage.

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5. Prior to 1974, AFM 30-7 defined adequacy in the same terms but absent the specification of a given number of square feet. In 1975 AFM 30-7 was superseded by AFR 30-7 containing the same terms as the version of AFM 30-7 issued on April 26, 1974. Neither of these changes is material to the issue at hand.

Historically, this has been the sole type of standard used by the armed forces. There was a statutory requirement that quarters be furnished at public expense at least as early as 1813; the officers' entitlements were to a certain number of rooms, nothing being said about their condition. Jones v. United States, 60 Ct.Cl. 552, 555 (1925). Ever since then, officers' entitlements have almost always been defined in terms either of number of rooms or square feet of space. See United States v. Phisterer, 94 U.S. 219, 24 L.Ed. 116 (1876) (Act of 1863); Hollister v. United States, 92 Ct.Cl. 137 (1940) (Act of 1922). The unsuitable condition of the rooms furnished generally has not been deemed a sufficient basis for a claim to payment of an allowance for quarters. See id. A regulation taking into account the type of structure, the condition of the premises, or the utilities and conveniences supplied in determining adequacy, such as the regulation considered in Lischak v. United States, 202 Ct.Cl. 598 (1973), is an historical anomaly.

In accordance with a proviso for specific exceptions contained in the DoD Instruction, the Secretary of the Air Force stated that, with respect to

the minimum standards of adequacy set forth by those regulations: "Oversea major commands may make appropriate reductions in these standards for areas involved in combat or contingency operations or areas directly supporting these operations." AFM 30-7 ¶ 2-2 (Jan. 1, 1970); AFR 30-7 ¶ 2-2 (May 12, 1975). Thailand was such an area throughout the period relevant to this appeal.

Pursuant to this delegation of authority, PACAF as an overseas major command issued a series of supplementary regulations. These PACAF Supplements established as the minimum standard of adequacy 110 square feet, exclusive of bathing and toilet facilities. Thus, while the PACAF definition reduces the space allowance it prescribes no standards for the physical facilities in which they are located. If there is now such a regulatory embellishment, it comes only because the Air Force prior to 1970 began the practice of maintaining real property records on each building designated for use as officers' quarters. These are maintained on a form, AF Form 1430. The form provides for the designation of each building's condition as "Usable--Class A

(Adequate)", or "Usable--Class B (Substandard)," and "Forced Use (Substandard)," "Sterile" or "Unusable."[6]

The officers here claim, and we accept for purposes of this appeal, that the real property records thus compiled classify 98.1% of the buildings used as officers' quarters in Thailand as less than "adequate."[7] The completion of AF Form 1430 is required by an Air Force regulation, AFM 93-1, which requires the Air Force to maintain real property accountability records on all structures within each Air Force installation. These records contain information concerning the physical attributes of the structures including such items

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6. See footnote 6 at end of opinion.

7. According to the plaintiffs, 330 buildings (45.3%) were classified as "Usable--Class B (Substandard)," 379 buildings (52.1%) were classified as "Forced Use (Substandard)" and 5 buildings (.7%) were classified as "Unusable." Only 14 buildings (1.9%) were classified as "Usable--Class A (Adequate)."

as gross dimensions and construction materials as well as various types of accounting data.[8]

During the period to which this action relates nothing in any regulation specified that the condition code used on Form 1430 determines the adequacy or inadequacy of the buildings described for purposes of BAQ. The words used are the same: both the statute and the real property records refer to adequacy. But their purposes are different; only semantic identity would lead to the conclusion that what is considered adequate physically in describing a building is also to

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8. AFM 93-1, the regulation providing authorization and instructions for the preparation of Form 1430, defines the purpose of the form. It states in part:

> 3-2. Accounting Record Forms. AF Forms 1430 . . . constitute the formal real property accountable records. They have been designed to record all pertinent engineering and statistical data concerning Air Force real property. This information, with supporting maps, plans, specifications and real estate instruments provides the needed engineering data for day-to-day maintenance and operation requirements of the base civil engineer as well as for master planning and project and military construction program development. The recorded data is also the basis for the real estate facilities cost system and attendant budget for maintenance, repair, and operation of the facilities, and for reports required by all echelons of command such as the USAF Real Property Inventory Detail List required by AFM 87-18.

determine whether quarters in the building are adequate and appropriate for purposes of the statute.

Prior to the time period relevant to this suit, AFM 30-7 contained a specific definition of "adequate" and "inadequate" quarters for BAQ purposes. The August 1, 1967 edition of the regulations required officers quarters to be "classified" as "Usable—Class A" . . . and [to] . . . meet the minimum standards of adequacy for occupancy established in this manual." It also stated, "These quarters will be carried as Condition Code 1 (Usable--Class A) on the real property records." For claims arising when that regulation was in effect, the Court of Claims held in Lischak v. United States, 202 Ct. Cl. 598 (1973), that the condition code on AF Form 1430 defined adequacy for BAQ purposes. The government does not criticize this result.

However, the Air Force subsequently cancelled the regulation that tied "adequacy" for BAQ purposes to the real property records and replaced it; the new regulation no longer refers in any way to AF Form 1430 or the condition code placed on it. See AFM 30-7 (Jan. 1, 1970); AFR 30-7 (May 12, 1975).

The inferential relationships by which the officers seek to establish a continuing tie between BAQ and AF Form 1430 are too gossamer to link them. Appendix A2 to AFM 30-7 and AFR 30-7 merely provides instruction for completing AF Form 515--"Bachelor Housing and Guest House Utilization/Occupancy Report"--a form showing the utilization of available bachelor housing. Under those instructions each installation is to identify the number of housing spaces classified as condition code "1", "2" or "3". This appendix provides no reasonable basis to infer that the Secretary of the Air Force intended to make the condition codes of AF Form 1430 definitional for BAQ purposes.

Indeed, AF Form 515 itself makes it clear that the condition code is not intended to show the adequacy of quarters for purposes of claiming entitlement to BAQ. As the instructions for completing that form show, all quarters whose condition code is a "1" or "2" are to be grouped together under the heading of "usable" spaces. This lack of distinction between condition code "2" (substandard) housing and condition code "1" (adequate) housing make it apparent that, whatever significance the

condition code may have in terms of engineering considerations or construction planning, it was not intended to serve as the criterion for distinguishing between adequate and inadequate housing for BAQ purposes.

But, the officers claim, even if the real estate records do not define adequacy, the space standards for the continental United States do, and these must be applied uniformly world-wide; the statute, they argue, does not permit geographic distinctions to be drawn in the regulations.

It is true that the grade, rank, or rating of each officer did not change when he was assigned to Thailand. However, the assignment patently changed his place of duty. It is not unreasonable to make a distinction between what is adequate (even in terms of space alone) for quarters in the tropics and what is suitable at the South Pole. It is no more unreasonable to take into account in considering adequacy not only the facts of climate but also the military, economic and social environment in the area where the officer is serving. The PACAF definition of 110 square feet (instead of 250 or 400 square feet) is not attacked because it is

unreasonable, but merely because it is different. The discretion of the military to set different adequacy standards for housing for different areas and conditions was upheld in Lischak v. United States, 202 Ct.Cl. 598 (1973), the Court of Claims decision upon which the officers rely to establish the authority of AF Form 1430. Id. at 607.

Such geographic distinctions are not precluded by the doctrine of statutory construction, expressio unius est exclusio alterius--the expression of one excludes the other. Congress authorized the standards of adequacy to vary according to grade, rank, rating and number of dependents, but this did not imply an exclusion of all other criteria for determining what is adequate for a particular rank of officer.

Because the officers raise no other attack on the square foot standard, the issue of its validity was properly determined on motion for summary judgment. There were no material issues of fact to be resolved. The regulation drew a distinction within the power of the President or his delegates to make. Its validity need not depend upon the President's power as Commander-in-

Chief or traditional judicial deference to military management of military affairs, see Gilligan v. Morgan, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973); Orloff v. Willoughby, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953). See also Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181 (1962).

However, for reasons set forth above, even the utmost deference to military judgment in armed forces affairs does not permit an air force commandant, or even the Chief Executive, to proclaim the arbitrary decision that anything the Air Force provides is by definition adequate.

For these reasons, we reverse as much of the judgment as dismisses the claims of the officers for BAQ after September 16, 1975. We affirm as much of the judgment as dismisses the claims of the officers who received 110 square feet of living space, exclusive of shared bathing and toilet facilities. To our mandate we add one caveat: the record does not permit us to determine and we express no opinion concerning whether any or all of the officers were in fact furnished adequate and appropriate quarters. That issue, like others,

remains to be resolved in further proceedings consistent with this opinion.

REVERSED IN PART AND REMANDED.

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6. Each AF Form 1430 contains a "1", "2", "3", "4", or "5" within the "condition" line and block space. The following definitions of "condition" apply to each "1", "2", "3", "4", or "5" found within a particular condition line and block space:

> 1 = Usable—Class A (Adequate)—Generally meets criteria. A facility which can be used to house the function for which currently designated through end position use with reasonable maintenance and without major alteration or reconstruction. Its functional adequacy, physical condition, structural adequacy, location, and adequate utility systems, i.e., heating, air conditioning, ventilation, power, etc., are the major elements of the determination. The use of this code does not prohibit project work. However, any construction project will indicate either a change in use, conversion or addition.
>
> 2 = Usable—Class B (Substandard)—Upgrading required and practical. A facility which is structurally sound, and which is inherently capable of being raised to Usable—Class A standards for housing function for which currently designated by reasonable and practical expenditure of funds; i.e., alteration, soundproofing, relocation, strengthening, fire protection deficiency correction, air conditioning, heating, or mechanical ventilation.
>
> 3 = Force [sic] Use (Substandard). A facility that cannot practically be raised to

meet Usable—Class A standards for housing function for which currently designated, but which, because of necessity must be continued in use for a short duration, or until a suitable facility can be obtained. Its physical condition, location, lack of adequate utility systems or other overriding factors are such that the facility cannot be justifiably or economically improved and/or upgraded for that function. This definition is also applicable to a leased facility where the lease was entered into as the only means by which the required space could be provided. This excludes leases which are advantageous to the Air Force for reasons of short duration of requirement, location, economics, etc., which will be Code 1.

4 = Sterile—A facility which: (a) does not meet the condition classification Codes 1, 2, 3, or 5; (b) is excess to mission requirement in designed, changed, or converted use and is not, due to economic considerations, considered appropriate for disposal. The expenditure of maintenance funds on facilities in this classification is not authorized except for safety, health, and/or 'pickling' the facility. This code will apply to all facilities as they are vacated when the entire installation becomes excess of requirements.

5 = Unusable—A facility which is no longer tenable for any purpose. It assumes that unsatisfactory or unsafe conditions exist which render it unacceptable and useless for housing personnel, equipment or supplies. This designation cannot be applied until the facility is vacated and when applied, requires disposal action within 120 days. Classi-

fication of airfield pavements as unusable must be approved by Hq USAF.

NOTES:

1. The Real Property Condition Codes 1, 2, and 3 are applied based upon the capability of the real property facility to accommodate the function for which currently designated on the 1-HAF-Z17. Therefore, that code is no indication of the ability of the facility to accommodate a different function.

2. Although structural condition must be considered in ascertaining code to be assigned, it is not the sole factor. Location of the facility with reference to other facilities or to adverse environmental conditions (air, noises), functional layout, and condition of support utilities are equally important.

3. Facilities which would be Code 1 will not be assigned a Code 2 or 3 based only on inadequate size.

4. The Data Element, 'Forced Use,' was formerly the Element, 'In Use.'

AFM 300-4, Vol. IV (June 15, 1973).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1092

KERRY P. DAY, RHETT G. CAMPBELL,
RICHARD D. HUFF, PETER H. LUKE,
PAUL M. SCOTT, JAMES A. TERHUNE,
on behalf of themselves and all
others similarly situated,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

- - - - -

Appeal from the United States District Court for the
Northern District of Texas

- - - - -

ON PETITION FOR REHEARING

(April 17, 1980)

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

- s -
United States Circuit Judge

Form 703-2

Supreme Court, U.S.
FILED
SEP 23 1980
MICHAEL RODAK, JR., CLERK

No. 80-118

In the Supreme Court of the United States

OCTOBER TERM, 1979

KERRY P. DAY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1979

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the court of appeals correctly sustained various military regulations establishing the adequacy of military housing for the purpose of determining eligibility to receive monetary housing allowances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-17 to A-38) is reported at 611 F. 2d 1122. The opinion of the district court (Pet. App. A-1 to A-16) is reported at 441 F. Supp. 165.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1980, and a petition for rehearing was denied on April 17, 1980 (Pet. App. A-39). The petition for a writ of certiorari was filed on July 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. 37 U.S.C. 403 provides that, under certain circumstances, eligible members of the uniformed services are entitled to receive a "Basic Allowance for Quarters" ("BAQ"):

> (a) Except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters * * *.
>
> (b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters.
>
> * * * * *
>
> (j) The President may prescribe regulations for the administration of this section, including definitions of the words "field duty" and "sea duty."

Pursuant to Section 4J3(j), the President and, pursuant to authority delegated by the President, the Secretaries of Defense and the Air Force promulgated regulations implementing 37 U.S.C. 403 and establishing the adequacy of bachelor quarters for the purpose of determining entitlement to BAQ.[1] These regulations provide that the standards of adequacy established therein may be reduced by major overseas commands for areas involved in combat or contingency operations or in support of those operations. Under this explicit delegation of authority, the Headquarters for the Pacific Air Force ("PACAF"), a major overseas command, issued a series of supplemental regulations to AFM 30-7 and AFR 30-7 stating that the minimum standards of adequacy applicable in Thailand and Southeast Asia would be "110 square feet for officer personnel excluding space for bathing and toilet facilities" (App. A-88, A-94, A-101, A-104). On September 16, 1975, PACAF issued a further supplement to AFM 30-7 and AFR 30-7 stating that "[t]he minimum adequacy standards for bachelor quarters in Thailand and Korea are waived" (App. A-142).

In addition to the regulations establishing the standards by which "appropriate" and "adequate" housing for purposes of housing allowance eligibility are to be judged, the Air Force maintains real property accountability records ("AF Form 1430") as to each structure on an Air Force installation. Pursuant to AFM 93-1 (App. A-52),

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[1]See Exec. Order No. 11157, 29 Fed. Reg. 7973 (1964) (App. A-18); DOD Instruction No. 4165.47 (App. A-26, A-31, A-41); AFM 30-7 (App. A-57); AFR 30-7 (App. A-111). ("App." refers to the oversized appendix lodged by petitioners with the Clerk of the Court.) AFM 30-7 was the operative Air Force regulation pertaining to BAQ in effect from January 1, 1970, through May 12, 1975 (App. A-57). At that time AFR 30-7 replaced AFM 30-7 as the effective regulation (App. A-111).

the Air Force records information relating to the physical structure and condition of the building and other miscellaneous accounting data.

2. The named petitioners in this action represent a class of unmarried Air Force officers who (1) were permanently stationed in Thailand during some portion of the period from January 27, 1970, through and including January 26, 1976, (2) were assigned to Air Force housing and (3) had no dependents. Petitioners filed suit in the United States District Court for the Northern District of Texas, alleging that, during the period they were permanently stationed in Thailand, they were assigned to quarters not "appropriate to [their] grade, rank, or rating and adequate for [themselves]" and that they therefore were entitled to BAQ for that period pursuant to 37 U.S.C. 403. In their motion for summary judgment, petitioners asserted that adequacy for purposes of BAQ must be determined by reference to the minimum adequacy standards defined in AFM 30-7 and AFR 30-7, as well as the condition code placed on AF Form 1430.[2] Although not questioning the delegation of authority to PACAF to issue supplementary regulations for Southeast Asia or the reasonableness of the Southeast Asia standards themselves, petitioners argued that the setting of different minimum standards of adequacy for different geographic areas constituted an improper exercise of authority under 37 U.S.C. 403.

The government also moved for summary judgment, contending that under Section 403 of Exec. Order No. 11157 (App. A-24) all petitioners provided with rent-free

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[2]Petitioners alleged that 98.1% of the housing facilities for bachelor officers in Thailand were classified as substandard in these real estate records.

quarters were ineligible to receive BAQ. In the alternative, the government argued that all petitioners assigned to quarters meeting the standards of adequacy set by PACAF for Thailand were assigned to "adequate" and "appropriate" housing and were therefore ineligible to receive BAQ under 37 U.S.C. 403(b).

The district court held that Section 403 of Exec. Order No. 11157, by providing that *any* quarters offered by the government without charge are by definition adequate under 37 U.S.C. 403, was invalid as inconsistent with the statute (Pet. App. A-4). Nevertheless, the court granted the government's motion for summary judgment as to the subclass of petitioners who had received quarters satisfying the PACAF standards of adequacy for Southeast Asia established in the supplemental regulations. It reserved for further hearing the question of which petitioners were in the subclass.

On appeal, the court of appeals affirmed the decision of the district court in part, holding that all petitioners who had been assigned to quarters that satisfied the minimum standards of adequacy established by PACAF for Thailand prior to September 16, 1975, were precluded from recovering BAQ. As to the period after September 16, 1975, when PACAF amended its supplemental regulations to waive all minimum standards of adequacy, the court of appeals held that the regulation was improper and unenforceable. The court of appeals therefore remanded the case to the district court for determination of whether petitioners' quarters had been adequate during that period.[3]

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[3]The court of appeals also upheld the district court's determination that Section 403 of Exec. Order No. 11157 was invalid (Pet. App. A-21 to A-23).

In their petition for rehearing, petitioners for the first time in this litigation asserted that the President had not delegated to the Secretary of Defense, the Secretary of the Air Force, or PACAF the authority to set minimum standards of adequate housing for purposes of BAQ. Also for the first time, petitioners raised the issue of whether PACAF applied proper factors in establishing the standards of adequacy, assuming that the President had properly delegated his authority. The court of appeals denied the petition for rehearing without comment.

ARGUMENT

1. Petitioners' primary argument (Pet. 22-28) is that neither the Secretary of Defense nor the Secretary of the Air Force has authority to establish minimum standards of "appropriate" and "adequate" housing for the purpose of determining eligibility for basic housing allowances under 37 U.S.C. 403(a) and (b). This argument was first asserted by petitioners in their petition for rehearing and therefore is not addressed in the opinion of the court of appeals. It is, in any event, meritless.

Executive Order No. 11157 is in pertinent part identical to its predecessor, which was promulgated in 1951.[4] Section 403 of Exec. Order No. 11157 provides that

> Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payment of rental charges (a) by a

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[4]Exec. Order No. 10204, 16 Fed. Reg. 417 (1951): "Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payment of rental charges (a) by a member and his dependents, or (b) at his permanent station by a member without dependents, or (c) by the dependents of a member on field duty or on sea duty or on duty at a station where adequate quarters are not available for his dependents, shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member under such circumstances * * *."

> member and his dependents, or (b) at his permanent station by a member without dependents, or (c) by the dependents of a member on field duty or on sea or on duty at a station where adequate quarters are not available for his dependents, shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member under such circumstances * * *.

This provision is ambiguous. It may have been intended to prevent a member of the uniformed services from occupying military housing and then claiming a housing allowance because he was not formally "assigned" quarters.[5] Alternatively, the provision may have been intended to prevent a member of the service from challenging the "appropriateness" or "adequacy" of quarters that he in fact voluntarily occupied without charge.[6] The lower courts in this case concluded that the latter construction would be inconsistent with the language of 37 U.S.C. 403(b).

Although Section 407 of Exec. Order No. 11157 explicitly authorizes the Secretaries of the various military departments to prescribe "such supplementary regulations not inconsistent [with Exec. Order No. 11157] as they may deem necessary or desirable for carrying out [Exec. Order No. 11157]," petitioners contend that the Secretaries have no authority to prescribe regulations establishing minimum standards of adequacy and appropriateness. According to petitioners, any such regulations would be "inconsistent" with Exec. Order No.

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[5]See *True* v. *United States*, 69 F. Supp. 128, 129 (Ct. Cl. 1947).

[6]See *Driver* v. *United States*, 106 Ct. Cl. 821, 823, 825 (1946); 40 Comp. Gen. 169, 171 (1960).

11157 and therefore unauthorized. That argument ignores at least 29 years of history. As noted above, Exec. Order No. 11157 is, in pertinent part, identical to Exec. Order No. 10204. The Secretaries of the various military departments have set minimum standards of adequacy for military housing since at least 1951. No President has construed either Exec. Order No. 10204 or 11157 as precluding such standards.

Furthermore, petitioners' argument ignores the context of the pertinent provisions and the language of Section 403 of the executive order itself. Sections 404, 405, and 406 of Exec. Order No. 11157 clearly contemplate that the Secretaries of the various military departments will prescribe minimum standards of adequacy for military housing for the purpose of determining eligibility for basic housing allowances. For example, Section 404 provides (App. A-24) (emphasis added):

> When *adequate quarters* for his dependents *are not available for assignment* at his permanent station to a member with dependents, he may occupy quarters of the United States designated for members without dependents without affecting his right to receive payment of basic allowances for quarters, if permitted or required to occupy quarters at such station. Under such circumstances, a member may not occupy quarters of the United States which *exceed the minimum standards for members of his grade without dependents, as prescribed by the Secretary concerned*, unless the only quarters available (a) exceed the minimum standard, and (b) are made available for joint occupancy with other members.

If, as petitioners assert, the only permissible standard for "adequacy" is occupancy in fact under Section 403 of the

executive order, then no Secretary could establish the "minimum standards for members of his grade without dependents" contemplated by Section 404 of the order.

Nor does the language of Section 403 of the executive order support petitioners' assertion that no standards of adequacy are permissible under that section. If occupancy in fact is the only standard for judging adequacy, the circumstance described in Section 403(c) of the executive order, *i.e.*, the absence of "adequate quarters" for a member's dependents, could never occur. Furthermore, as noted above, Section 403 of the executive order can reasonably be read to make occupancy in fact the standard for determining whether quarters have been "assigned," leaving questions of the appropriateness and adequacy of the quarters "deemed to have been assigned" for flexible definition in light of the circumstances. Indeed, until they sought rehearing in the court of appeals, petitioners seem to have urged this position.[7] The court of appeals thus correctly sustained the authority of the Secretaries to prescribe minimum standards of adequacy.[8]

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[7]In their brief to the court of appeals, petitioners stated (Br. 20): "Plaintiffs admit that the Secretary of the Air Force had the authority to prescribe standards defining 'appropriate to his grade, rank, [or] rating and adequate for himself' within the meaning of 37 U.S.C. § 403(b). The Secretary of the Air Force exercised that authority by enacting 'condition codes' * * * classifying the adequacy of buildings for housing of officers and by enacting 'minimum adequacy standards' set forth in AFM 30-7 and AFR 30-7 * * *. Plaintiffs submit that these standards are applicable and controlling."

[8]The court of appeals also properly rejected (Pet. App. A-15) petitioners' contention that "appropriateness" or "adequacy" cannot be determined in light of prevailing environmental, social, economic, and military conditions. See also *Lischak* v. *United States*, 202 Ct. Cl. 598, 604 (1973). Petitioners' belated attempt to manufacture a question of fact as to the reasonableness of the governing standards

2. Petitioners contend (Pet. 28, 32) that the court of appeals erred when it held that DOD Instruction No. 4165.47, AFM 30-7 and AFR 30-7, as well as the PACAF Supplements to the Air Force regulations were intended to constitute the standards of adequacy of housing for BAQ purposes. This contention is without merit. The two Department of Defense instructions numbered 4165.47, which were in effect from May 12, 1972, through the filing of the petition, give as their source of authority the BAQ statute (App. A-31, A-41). Similarly, DOD Instruction No. 4165.47, in effect prior to May 12, 1972, cites its authority as Exec. Order No. 11157 (App. A-26). The applicable Air Force Regulations, AFM 30-7 and AFR 30-7 (App. A-57, A-111), as well as the PACAF Supplements (App. A-88, A-94, A-101, A-142), also trace their authority to DOD Instruction 4165.47 and Exec. Order No. 11157. It is apparent, therefore, that these regulations were adopted pursuant to 37 U.S.C. 403 and Exec. Order No. 11157 and were intended to prescribe minimum standards of adequacy.

In any event, the contention provides no basis for challenging the decision of the court of appeals in this case. The Department of Defense and the Air Force regulations, issued pursuant to valid authority,[9] express the judgment of those departments as to the minimum standards of satisfactory housing for military personnel, specifically authorizing the establishment of lower

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(Pet. 33-34) is frivolous. A party's assertion in a brief or petition for rehearing is not sufficient to create an issue of fact, precluding summary judgment under Fed. R. Civ. P. 56.

[9]Without regard to 37 U.S.C. 403(b) and Exec. Order No. 11157, the Secretaries of Defense and the Air Force have general rulemaking authority. See 5 U.S.C. 301; 10 U.S.C. 131 and 8012(e).

standards for major overseas commands in light of the circumstances considered relevant by commanding officers. The PACAF supplemental regulations established standards for judging the adequacy of military housing in Thailand. The court of appeals affirmed the judgment of the district court dismissing the claims of all petitioners who were assigned to quarters that satisfied the standards prescribed in the PACAF supplemental regulations. Since petitioners never challenged the adequacy or reasonableness of the standards in light of the circumstances existing in Thailand at the time, there was no reason for the court of appeals to consider those issues. As noted above, petitioners' belated attempt to raise these issues in their petition for rehearing and in their petition for certiorari is insufficient to create an issue of fact precluding summary judgment.

3. The court of appeals correctly found (Pet. App. A-28 to A-33) that the real property records maintained by the Air Force (AF Form 1430) do not define what military housing is "appropriate to [the] grade, rank, or rating and adequate" for members of the uniformed services, within the meaning of 37 U.S.C. 403(b). There is simply no basis for petitioners' assertion (Pet. 18-19) to the contrary, except perhaps that both the statute and AF Form 1430 refer to "adequacy." Prior to 1967, "adequacy" for purpose of 37 U.S.C. 403(b) was expressly tied to the real property records maintained by the Air Force.[10] The regulations in effect during the time relevant to this litigation do not even refer to AF Form 1430. Thus, as the

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[10]For that reason, *Lischak* v. *United States*, 202 Ct. Cl. 598 (1973), in which the Court of Claims relied on the classification in AF Form 1430 to determine the "adequacy" of military housing under 37 U.S.C. 403(b), is consistent with the court of appeals' decision in this case.

court of appeals observed (Pet. App. A-32 to A-33), "whatever significance the [AF Form 1430] condition code may have in terms of engineering considerations or construction planning, it was not intended to serve as the criterion for distinguishing between adequate and inadequate housing for BAQ purposes."[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

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[11]Petitioners' assertion (Pet. 9, 13) that the court of appeals' decision conflicts with the decisions of this Court in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957); and *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), is insubstantial because the pertinent regulations were applied in this case. Similarly, petitioners' assertion (Pet. 9-11) that the court of appeals' decision conflicts with the "principles" of *Bell* v. *United States*, 366 U.S. 393 (1961); *United States* v. *Andrews*, 240 U.S. 90 (1916); and *United States* v. *Symonds*, 120 U.S. 46 (1887), is without merit. Petitioners have no statutory "entitlement" to housing allowances if they are provided with "appropriate" and "adequate" military housing without charge. The court of appeals correctly sustained the regulations of the Secretaries, which establish minimum standards of "adequacy" for purposes of 37 U.S.C. 403(b).

DOJ-1980-09